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RAILROAD REPORTS

**(Vol. 41 American and English
Railroad Cases, New Series)**

A COLLECTION OF ALL

**CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT**

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XVIII.

**THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.**

1906.

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RAILROAD REPORTS

ST. LOUIS, M. & S. E. RY. CO. *v.* BUSICK.

(Supreme Court of Arkansas, April 1, 1905.)

[86 S. W. Rep. 674.]

Cattle Guards—Defects—Right of Action—Common Law.—Injuries arising from defective stock guards, or their absence, or through unsafe places upon the right of way of a railroad, where there is no duty owing to the public, are actionable only by virtue of Kirby's Dig. §§ 6644, 6645, requiring railroads to construct stock guards, and there is no common-law remedy for such injuries.

Same—Same—Remedies.—Under Kirby's Dig. §§ 6644, 6645, requiring railroads to construct stock guards, and providing that a failure to comply with the statute shall render the railroad company liable to the person aggrieved for a penalty of not less than \$25 nor more than \$200, the penalty is the only remedy for violation of the statute, and one whose stock is injured by the insufficiency of cattle guards cannot recover the value of the stock.

Same—Same—Penalty—Evidence.—Evidence of the value of the stock is, however, admissible to aid the jury in determining the amount of the penalty to be imposed.

Same—Sufficiency—Evidence.*—Under Kirby's Dig. § 6644, requiring railroads to construct suitable and safe stock guards, the fact that a stock guard does not prevent stock from passing over it does not conclusively show that it is unsuitable and unsafe.

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Action by Charles S. Busick against the St. Louis, Memphis & Southeastern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. T. Parker and Orr & Luster, for appellant.

Chas. S. Busick, pro se.

HILL, C. J. Busick sued the railroad company, alleging that it constructed a cattle guard in such a negligent and defective manner that it would not prevent the passage of stock over it, and left it in an unsafe condition, and that by reason thereof his mare was injured in it, and died from such injuries, and prayed judgment for her value. A demurrer to the complaint was overruled, issue taken on the answer, a trial by jury, and verdict for Busick, and from judgment thereon the railroad has appealed.

Among other instructions, the court gave this: "If the jury

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to cattle guards, in actions for injuries to live stock, see foot-note appended to *Campbell v. Iowa Cent. Ry. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601.

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find from a preponderance of the evidence that the cattle guard in which it was alleged plaintiff's horse was injured was defectively constructed, so as not to effectively prevent stock from passing over the same, and that plaintiff's horse was injured while attempting to pass over the same, then you will find for the plaintiff in such sum as the evidence may show was the value thereof at the date of the injury." Prior to the passage of the act of April 10, 1893, which is contained in sections 6644, 6645, Kirby's Dig., there was no duty resting upon railroad companies to construct stock guards. Defective stock guards, or their absence, or other unsafe places, upon the right of way, where there was no duty owing to the public, gave rise to no cause of action for injuries received from them. *Railway v. Walbrink*, 47 Ark. 330, 1 S. W. 545; *Railway v. Fairbairn*, 48 Ark. 493, 4 S. W. 50; *Railway v. Ferguson*, 57 Ark. 16, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. Rep. 217; *Railway v. Vosburg*, 71 Ark. 232, 72 S. W. 574. Therefore the whole remedy for injuries from stock guards must be looked for in this statute, and not elsewhere, as there is no common-law remedy for such injuries. *Railway v. Ferguson*, 57 Ark. 16, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. Rep. 217; *Railway v. Vosburg*, 71 Ark. 232, 72 S. W. 574.

The first section (section 6644, Kirby's Dig.) provides when and where stock guards may be required, and that they shall be "suitable and safe stock guards" and that they must be kept in repair. The next section (section 6645, Kirby's Dig.) provides that a failure to comply with the requirements preceding shall render the railroad company liable to the person aggrieved thereby for a penalty of not less than \$25 nor more than \$200 for each and every offense, to be collected by civil action. In *Railway v. Vosburg*, 71 Ark. 292, 72 S. W. 574, the court said of this penalty: "The inference is that the penalty, being recoverable by the party aggrieved, was intended as a full compensation to him for the injury received, and therefore he is limited to the remedy given by the statute." It follows that the complaint praying damage for the value of the mare, and the instruction in question, and others given embracing the same theory, had no place in this suit, which should be for a penalty alone, and not for damages. The admission of evidence of the value of the mare, as indicating a basis for the amount of penalty which the jury, in its discretion, might award, would not be error. The more serious error of the instruction is that it instructs the jury that if the cattle guard was defectively constructed, "so as not to effectively prevent stock from passing over the same, and that plaintiff's horse was injured while attempting to pass over the same," then the railroad company would be liable. In *Railway v. Goset*, 70 Ark. 427, 68 S. W. 879, the court laid down a different rule: "The law does not impose an impossible or impracticable duty upon the company, and, when its stock guard is as perfect and as well adapted for the purpose of turning stock as it is practicable to make it, in connection with

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the safe and prudent operation of the road, that is all the law requires, and the company has discharged its duty under the statute. But the question is usually one of fact for the jury, and it would not be proper for the court to instruct them that the company has discharged its duty if the guard is similar to those used by other first-class railroads, nor, in a case like this, to instruct that the fact that stock occasionally pass the stock guards is not sufficient to show that the guard was unsafe." The instruction in question ignores this rule, and substitutes a rule that the stock guard must effectively prevent stock from passing; making, in fact, the railroad an insurer that no cattle can pass the stock guard. The complaint is defective, the instructions based on a wrong theory, and the judgment must be reversed and remanded; but leave will be granted the plaintiff to amend, if so advised, so as to make this a suit for a penalty, and show himself a party aggrieved, within the statute, by reason of the defective guard, and the defects in it must be tested before the jury under instructions embodying the rule above laid down. Reversed and remanded.

McKEE v. HARRISBURG TRACTION CO.

(Supreme Court of Pennsylvania, March 6, 1905.)

[60 Atl. Rep. 498.]

Street Railroads—Collision with Bicyclist.*—In an action to recover for injuries received by collision between plaintiff's bicycle and an electric car, evidence held insufficient to show negligence on the part of defendant, requiring submission to jury.

Appeal from Court of Common Pleas, Dauphin County.

Action by James T. McKee against the Harrisburg Traction Company. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles L. Bailey, Jr., and Le Roy J. Wolfe, for appellant.
W. M. Hargest, for appellee.

FELL, J. On a Sunday afternoon in July the plaintiff was riding on a bicycle on a street in Harrisburg on which the defendant's electric cars ran. Behind him a man was riding a horse, at a slow trot, and leading another horse, for the purpose

*As to care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Searles v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781; foot-notes appended to *Holden v. Missouri R. Co.* (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; *Anniston Elec. & Gas. Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

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of accustoming them to the electric cars. Fearing injury by the horses, the plaintiff turned aside and allowed them to pass by him, and then followed 20 or 25 feet behind them. When about the middle of the block the led horse showed some evidence of fright at an electric car which approached from the opposite direction, and, as the car was about to pass or in the act of passing, it turned towards the curb and blocked the passage between the curb and the car tracks. The plaintiff, to avoid running into the horse, rode towards the track. When close to it, he saw an open summer car approaching and within 20 feet of him. He then attempted to turn and ride between the car and the horses. He did not get far enough away from the track, and the front wheel of his bicycle was struck by the running board of the car. The plaintiff did not see the car until he was within six inches or a foot of the track and approaching it. Until this time the motorman had no opportunity to see him, because he was behind the horses. When the horse shied, the motorman turned off the power, and, as he passed the horses, he had his hand on the brake, and was watching them to see whether they were under control. The only matter of dispute at the trial was as to the rate of speed of the car. In regard to this there was the usual difference of opinion, but there was testimony tending to show that the car was running 15 or 20 miles an hour.

Three grounds of negligence were alleged: That the car was not equipped with suitable appliances for stopping it; that it was in charge of a motorman known to the defendant's officers to be habitually careless; that the excessive speed of the car frightened the horses, and prevented the plaintiff from escaping from his perilous position behind them. Of the first two there was no proof, and we find nothing in the testimony in relation to the third that would warrant a finding by the jury that the accident was caused by the motorman's negligence. The car was running rapidly. It is intended that electric street cars should run rapidly. The use of electricity as a motive power by street railway companies has increased the danger to all persons using city streets, and of this danger they must take notice. "Rapidity of transit is no longer a mere convenience to the traveler; it has become a matter of vital interest to the general business of the community." *Thane v. Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767. The car was at the middle of the block, with a clear track, and it was not shown that its speed was improper. Aside from the merest conjecture of two or three witnesses, there was nothing in the case from which it could be inferred that the speed caused the horses' fright. But if we assume that a rapidly moving car is more likely to frighten a horse than a slowly moving one, there was nothing to indicate to the motorman that the high speed might be a danger to any one. The horses had been brought to the street frequently before to train them, and on these occasions he had not been signaled to slow up as he passed them. Neither

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he nor the man in charge of the horses apprehended any trouble from them; but to guard against the possibility of it, he watched the horses' actions and turned off the power, keeping his hand on the brake so as to be able readily to control the car. The accident cannot be attributed to the speed of the car, unless we assume that the speed caused the horses' fright and prevented the plaintiff's escape after he had committed the mistake of getting too near the track. If we accept both of these assumptions, the defendant cannot be held liable unless we further assume that the motorman should have anticipated what had not before occurred, the fright of the horse and the blocking of the passageway, and that some one riding close behind the horse would turn towards the track instead of stopping or turning toward the curb. This would be the building up of a case by assumption and inference, instead of by the affirmative proof of negligence which the law requires. True, when an act is clearly negligent, one may be held liable for its unforeseen consequences, however remote, which follow in the natural sequence of events. But an act cannot be held to be negligent when, as in this case, there was no reasonable ground for supposing that it would cause injury to any one.

There was no negligence on the part of the motorman in not sooner stopping the car. He had no chance to stop it. If the speed was that testified to by the plaintiff's witnesses, the collision occurred in less than a second after he could have seen the plaintiff. Negligence cannot be imputed because of the failure to perform a duty so suddenly and unexpectedly arising that there is no opportunity to comprehend the situation and act according to the exigency. *Hestonville, etc., Pass. Railroad Co. v. Kelley*, 102 Pa. 115; *Phillips v. Railway Co.*, 190 Pa. 222, 42 Atl. 686. In *Funk v. Traction Co.*, 175 Pa. 559, 34 Atl. 861, a boy ran diagonally across the street and suddenly came in contact with a rapidly moving car. It was said in the opinion: "It was not the speed of the car that caused the injury, but the sudden and unexpected act of the plaintiff in running against the car, if such were the fact, that occasioned the accident. There was not opportunity to guard against it, and hence no breach of duty." *Kline v. Traction Co.*, 181 Pa. 276, 37 Atl. 522; *Pletcher v. Traction Co.*, 185 Pa. 147, 39 Atl. 837; *Miller v. Traction Co.*, 198 Pa. 639, 48 Atl. 864, and many other cases, in which children suddenly ran in front of or against rapidly moving cars, were decided on the same ground.

The eighth assignment of error is sustained, and the judgment is reversed, and judgment is now entered for the defendant.

CHICAGO GREAT WESTERN RY. CO. *v.* TROUP.

(Supreme Court of Kansas, March 11, 1905.)

[80 Pac. Rep. 30.]

Injury by Locomotive—Number of Engine.—There is no error in refusing to limit the inquiry as to the engine which injured plaintiff to an engine of a certain number, though that numbered engine was testified to as the one in question; the number of the engine not being essential, and the jury being authorized to find for plaintiff, though they did not find that the engine that did the injury bore that number.

Trespassers—Ejection—Authority of Fireman—Pleading.*—The petition stating that, at the time plaintiff was injured by the locomotive, it was in charge of, and under the management and control of, defendant's servants, who were respectively fireman and engineer thereon, by implication alleges that the fireman had authority to eject trespassers therefrom.

Same—Same—Which Employee—Pleading.—The essence of plaintiff's charge being that some one acting as fireman for defendant, with the necessary implied authority of a fireman, committed the wrongs, it is immaterial whether he was a fireman, or some other employee of defendant temporarily engaged as a fireman.

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by David Troup, a minor, against the Chicago Great Western Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Frank Hagerman, Miller, Buchan & Miller, and A. F. Smith, for plaintiff in error.

Getty, Hutchings & Dean and John Warren, for defendant in error.

PER CURIAM. This is an action brought by a minor to recover his damages because of personal injuries suffered by the wanton negligence of the plaintiff in error. It is a companion case to *Chicago Great Western Railway Company v. Troup*, 76 Pac. 859, in which the father of the injured boy recovered damages for the same injury here sued for. All of the errors complained of in that case are here again presented for review. No material difference appearing as to such claimed errors, that case will be followed. They are as to the sufficiency of the evidence to identify the train which inflicted the injury as one operated by the defendant; to show authority in the fireman who expelled the plaintiff from the train to do so; and to show wantonness on

*For the authorities in this series on the subject of the authority of employees to eject trespassers, see foot-note appended to *McKeon v. New York, etc., R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & Eng. R. Cas., N. S., 375 (authority of brakeman); note 6 Am. & Eng. R. Cas., N. S., 59; *Galveston, H. & S. A. Ry. Co. v. Zantzinger* (Tex.), 16 Am. & Eng. R. Cas., N. S., 679 (authority of engineer); *Highland Ave. & B. R. Co. v. Robinson* (Ala.), 19 Am. & Eng. R. Cas., N. S., 357 (authority of conductor).

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the part of the defendant, the injured boy being a trespasser; and as to whether the plaintiff was guilty of such contributory negligence as to preclude recovery. However much we might be inclined to doubt the strength of the evidence upon these points, were the weight of evidence for us to pass upon, we may only say now that the jury has settled them against the contentions of plaintiff in error, and its verdict has received the approval of the trial court. Brief attention will be given to the other questions presented:

1. There was no error committed by the court in refusing to limit the inquiry as to the engine which did the injury to No. 439, although that number was testified to as being the engine which was in question. The number of the engine was not an essential in the inquiry. The jury might have found for the plaintiff, even though it did not find that the engine in question was No. 439.

2. In none of the criticised instructions was it assumed that the engine which did the damage was the defendant's. That question was fairly submitted to the jury by the court.

3. The complaint that the petition did not state a cause of action, because it failed to charge that the fireman was acting within the scope of his employment, is not well taken. The petition did state that at the time the injury was inflicted "the said locomotive was in charge of, and under the management and control of, defendant's servants and agents, who were, respectively, fireman and engineer thereon." The allegation that the engine was under the management and control of the fireman by reasonable implication is an allegation that the fireman had a right to eject trespassers therefrom.

4. We think there was no error in refusing to give instruction 12 asked by the defendant, or in giving number 20, as the court did. The essence of the plaintiff's claim was that the one acting as fireman, with the necessary implied authority of a fireman, committed the wrongs complained of, and it mattered not whether technically he was a fireman, or some other employee of the company, temporarily engaged as such.

We have given the other claimed errors careful attention, but find in them nothing warranting a reversal, and the judgment of the court below will be affirmed.

SANDERS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Aug. 4, 1905.)

[51 S. E. Rep. 728.]

Evidence—Hearsay.—The evidence which the court refused to admit, being hearsay, was properly excluded.

New Trial—Grounds of Motion.—A ground of motion for new trial, assigning error upon the refusal of the court to permit a witness of the complaining party to answer a designated question,

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should show, not only what answer was expected, but that the judge was informed as to it. *Leverett v. Bullard*, 49 S. E. 591, 121 Ga. 536.

Appeal—Assignment of Error.—An assignment of error upon the admission of testimony should show, not only that it was admitted over objection of the complaining party, but what grounds of objection he urged at the time the evidence was offered. *Powell v. Georgia, Fla. & Ala. Ry. Co.*, 49 S. E. 759, 121 Ga. 803.

Negligence—Ordinary Diligence.*—On the trial of an action brought by an employee against a railway company for personal injuries alleged to have been caused by the negligence of the company, the court charged the jury as follows: "Ordinary care and diligence is that care and diligence which every prudent man takes under the same or similar circumstances. You are to judge of the conduct, the diligence, the negligence, and the acts of the plaintiff and the defendant in this case by that rule." Held, that the definition of ordinary diligence was correct (*Richmond R. Co. v. Mitchell*, 18 S. E. 290, 92 Ga. 77 [2]), and that the court did not express an opinion to the effect that the plaintiff was negligent any more than that he was diligent. The instruction meant that the jury should judge of (i. e., concerning) the conduct, the diligence, the negligence, and acts of both parties by the application of the rule given

Injury to Employee—Instructions.†—In such a case it was not error to charge that, in order for the plaintiff to recover, it should appear from the evidence that at the time he was injured he "was in the exercise of ordinary care and diligence and was free from fault." If he was free from fault, as he had to be in order to recover, he was necessarily in the exercise of ordinary care. Moreover, the petition alleged that at the time of the injury the plaintiff "was in the exercise of all ordinary care and diligence, and was free from any fault whatsoever."

Same—Negligence of Master.‡—Nor was it error for the court in its charge to assume "that negligence of the company and its failure to exercise ordinary care and diligence were synonymous terms."

Same—Evidence.§—In order for an employee to recover in an action of the nature above referred to, it must appear from the evi-

*See note 17 R. R. R. 236, 40 Am & Eng. R. Cas., N. S., 236.

†For the authorities in this series on the subject of the degree of care required of an employee for his own protection, see foot-notes appended to *Foster v. New York, etc., R. Co. (Mass.)*, 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343.

‡For the authorities in this series on the subject of the degree of care required of a railroad company as a master, see foot-notes appended to *Dean v. Oregon R. & Nav. Co. (Wash.)*, 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

§For the authorities in this series on the question whether contributory negligence on the part of an employee will prevent recovery against the master for his injuries or death, see *Benson v. New York, etc., R. Co. (R. I.)*, 14 R. R. R. 324, 37 Am. & Eng. R. Cas., N. S., 324; *McMillan v. Grand Trunk Ry. Co. (C. C. A.)*, 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712; *Harrill v. South Carolina & G. E. R. Co. (N. Car.)*, 12 R. R. R. 725, 35 Am. & Eng. R. Cas., N. S., 725; *Chapman v. Pere Marquette R. Co. (Mich.)*, 8 R. R. R. 661, 31 Am. & Eng. R. Cas., N. S., 661; *Elmore v. Seaboard Air Line Ry. Co. (N. Car.)*, 8 R. R. R. 663, 31 Am. & Eng. R. Cas., N. S., 663; *Schlemmer v. Buffalo, R. & P. Ry. Co. (Pa.)*, 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240; *Edwards v. Central of Georgia Ry. Co. (Ga.)*, 9 R. R. R. 120, 32 Am. & Eng. R. Cas., N. S., 120 (nonsuit where both negligence and contributory negligence); *Choctaw, O. & G. R. Co. v. Holloway (C. C. A.)*, 4 R. R. R. 75, 27 Am. & Eng. R. Cas., N. S., 75 (contributory negligence and assumption of risk no defense where collision and injury to servant was

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dence that he was free from fault contributing to his injuries, and that they were caused by the negligence of the company. If the plaintiff and the defendant were both negligent, or if they were both free from fault, in neither instance can the plaintiff recover. The instructions of the court on this subject, to which exceptions were taken, were in substantial accord with the rules above announced, and were not erroneous, at least for any reason assigned.

Same—Instructions.—The court charged the jury: "Now, you look to the evidence, and see whether or not it is shown that the bell was not rung. See what the truth of that is. If you find that the bell was rung, you need give no consideration to that allegation contained in the declaration. If you find * * * that the bell was not rung, as contended for by plaintiff, * * * then you look to the * * * evidence, and see whether or not the railway company * * * [was] in the exercise of ordinary care and diligence." This charge did not ignore the issue as to whether or not the bell was rung; nor "was it error, as not fully submitting the issue to the jury, in that the court did not tell the jury how and in what manner the bell should be rung in order to comply with the demand of diligence." Had the court so told the jury, it would have been an expression of opinion that the acts specified would constitute diligence.

Same—Opinion on Facts.—The court properly instructed the jury not to consider the Carlisle mortality table, which was in evidence, if they should believe from the evidence that the plaintiff was not entitled to recover, or that his injuries were not permanent. There was no expression of "opinion on the facts" in such charge.

Same—Instructions.—After the court had in its charge twice stated fairly and explicitly all the specifications of negligence alleged against the defendant in the petition, it was not cause for a new trial that, in the same connection and while instructing the jury to look

caused by absence of brakes); *Morrisette v. Canadian Pac. Ry. Co.* (Vt.), 5 R. R. R. 219, 28 Am. & Eng. R. Cas., N. S., 219 (contributory negligence of brakeman in going up side of car did not necessarily prevent him from recovering for injuries caused by proximity of switch to track); *Elmore v. Seaboard Air Line Ry. Co.* (N. Car.), 4 R. R. R. 566, 27 Am. & Eng. R. Cas., N. S., 566 (defense cut off by contributory negligence); *O'Brien v. New York, N. H. & H. R. Co.* (Mass.), 1 R. R. R. 346, 24 Am. & Eng. R. Cas., N. S., 346 (directing verdict in action for injury to brakeman caused by loose wheel); *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Tex.), 3 R. R. R. 178, 26 Am. & Eng. R. Cas., N. S., 178 (must be proximate cause of injury); *Roberts v. Albany & N. Ry. Co.* (Ga.), 1 R. R. R. 349, 24 Am. & Eng. R. Cas., N. S., 349 (nonsuit); *Green v. Brainerd & N. M. Ry. Co.* (Minn.), 4 R. R. R. 87, 27 Am. & Eng. R. Cas., N. S., 87 (no recovery for injury to employee where proximate cause was his disobedience of rules); note 20 Am. & Eng. R. Cas., N. S., 305; note, 18 Am. & Eng. R. Cas., N. S., 696 (as bar to recovery under employers' liability acts), note, 12 Am. & Eng. R. Cas., N. S., 668 (failure to obey rules as affecting right to recover); note, 11 Am. & Eng. R. Cas., N. S., 869 (negligent master not liable where contributory negligence of injured employee was proximate cause of injury); note, 20 Am. & Eng. R. Cas., N. S., 277 (violation of rule must be proximate cause); *Coley v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 885 (under employers' liability act of North Carolina); *Southern Ry. Co. v. Arnold* (Ala.), 11 Am. & Eng. R. Cas., N. S., 864 (brakeman who fails to use ordinary care in coupling cars cannot recover for injuries thereby sustained); *Southern Ry. Co. v. Harbin* (Ga.), 18 Am. & Eng. R. Cas., N. S., 692 (under employers' liability act of Georgia); *Southern Ry. Co. v. Mauzy* (Va.), 20 Am. & Eng. R. Cas., N. S., 647 (effect of where proximate cause of injury to employee); *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622 (must be proximate

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to the evidence in order to ascertain the truth as to each allegation and contention, the court omitted from its enumeration of such allegations one charge of negligence; it appearing that this portion of the charge closed with the statement that "all these matters and all these contentions, wherein it is charged that the defendant company was negligent, * * * are matters entirely for you to pass upon," under the evidence submitted and the law given in charge.

Same—Evidence.—The verdict was amply supported by evidence, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by J. C. Sanders against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. W. Harris and Ino. R. Cooper, for plaintiff in error.

Hall & Wimberly, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

cause of injury to prevent recovery); *Louisville & N. R. Co. v. York* (Ala.), 23 Am. & Eng. R. Cas., N. S., 470 (no defense to count in complaint for willfulness, wantonness or intentional wrong, under employers' liability act of Alabama); *Blackstone v. Central of Georgia Ry. Co.* (Ga.), 20 Am. & Eng. R. Cas., N. S., 365 (nonsuit properly ordered in action for injury to yardmaster knocked from moving car by electric light pole too near track in yard, with which he was familiar); *Illinois Cent. R. Co. v. Josey* (Ry.), 20 Am. & Eng. R. Cas., N. S., 869 (of section hand riding on hand car, in failing to hold on to lever, did not preclude recovery for his death caused by negligence of his foreman, having knowledge of such failure, in suddenly checking car); *Seldomridge v. Chesapeake & O. Ry. Co.* (W. Va.), 14 Am. & Eng. R. Cas., N. S., 639 (prevents recovery for death or injuries of servant); *McGeary v. Old Colony R. R.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 764 (servant cannot recover if his negligence contributed to his injury although master was also negligent); *Chicago, R. I. & P. Ry. Co. v. Cowles* (Neb.), 11 Am. & Eng. R. Cas., N. S., 33 (verdict reversed because of servant's contributory negligence); *Holt v. Chicago, etc., Ry. Co.* (Wis.), 7 Am. & Eng. R. Cas., N. S., 775; *Southern Ry. Co. v. Baston* (Ga.), 8 Am. & Eng. R. Cas., N. S., 755 (negligence of employee must have contributed in causing his injuries to prevent recovery); *Conway v. Chicago, etc., Co.* (Iowa), 8 Am. & Eng. R. Cas., N. S., 755; *Southern Ry. Co. v. Pugh* (Tenn.), 8 Am. & Eng. R. Cas., N. S., 756 (in an action for injuries to an employee, if it appears that plaintiff's negligence was merely contributory in causing the injuries, and not the proximate cause, defendant may be liable, provided its negligence was the proximate cause; but any contributory negligence of plaintiff must be considered in mitigation of damages); *Texas Cent. Ry. Co. v. Lyons* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 316; *Louisville & N. R. Co. v. Hiltner* (Ky.), 20 Am. & Eng. R. Cas., N. S., 279; (if an engineer injured in a rear-end collision violated a rule of his company prescribing the distance at which he should follow the train in front of him, and but for that fact he would not have been injured, he cannot recover, notwithstanding the negligence of other servants of the company); *McCreery v. Ohio River R. Co.* (W. Va.), 20 Am. & Eng. R. Cas., N. S., 875.

DRIVER'S ADM'R v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, March 9, 1905.)

[49 S. E. Rep. 1000.]

Exceptions.—Though a bill of exceptions is the usual mode of making the court's action on a motion and exceptions thereto a part of the record, an order of court showing that plaintiff moved the court to require defendant to file a statement of its grounds of defense, that the motion was overruled, and the plaintiff excepted, is sufficient.

Bill of Particulars.—Under Code 1887, § 3249 [Va. Code 1904, p. 1709], providing that the court in any action may require a statement of the particulars of the claim or ground of defense, whether or not such statement shall be required is within the trial court's discretion.

Same—Action for Death of Employee—Defenses.—Where, in an action against a railroad company for the death of an employee, the grounds of defense actually relied on were defendant's want of negligence and negligence of decedent and his fellow servants, the court's refusal to require a statement of the ground of defense was not prejudicial to plaintiff.

Evidence—Making Up Trains—Changes—Authority of Conductor.—Where a train properly made up at its starting point was changed by the conductor, evidence relating thereto, not tending to show authority to make the change, was properly rejected.

Death of Employee—Collision—Evidence—Habitual Disregard of Rule—Knowledge of Company.*—In an action against a railroad company for death resulting from collision, evidence showing a habitual disregard by employees of a rule requiring the placing of warning signals on the stoppage of trains on the track is properly excluded where it is shown that the company had notice of the violations.

Negligence—Telegraph Offices—Violation of Statute Not Cause of Accident.—A railroad company is not chargeable with negligence in failing to maintain telegraph offices along its line not more than 10

*For the authorities in this series on the question whether a railroad company is responsible for injuries to servant resulting from the violations of rules made for the protection of employees, see foot-note appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621 (waiver of rules by master); foot-notes appended to *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621 (contributory negligence and assumption of risk where railroad employees fail to comply with rules and orders); *Northern Pac. Ry. Co. v. Mix* (C. C. A.), 6 R. R. R. 739, 29 Am. & Eng. R. Cas., N. S., 739 (violation of rule by train dispatcher prima facie evidence of negligence); *Wright v. Southern Ry. Co.* (Va.), 5 R. R. R. 438, 28 Am. & Eng. R. Cas., N. S., 438 (master chargeable with knowledge of disregard of rules); *Cincinnati, etc., Ry. Co. v. Cook* (Ky.), 2 R. R. R. 321, 25 Am. & Eng. R. Cas., N. S., 321 (rules of master as evidence in action for death from negligence of servant, where master and servant are joined as defendants); note appended to *Smithson v. Chicago, G. W. Ry. Co.* (Minn.), 11 Am. & Eng. R. Cas., N. S., 726 (admissibility of rules as evidence in actions for injuries to servants); note, 17 Am. & Eng. R. Cas., N. S., 431; *Louisville, N. A. & C. Ry. Co. v. Heck* (Ind.), 11 Am. & Eng. R. Cas., N. S., 382 (where a rule of the company gives to a train dispatcher's act all the effect of an act of a division superintendent the company is responsible therefor in the same degree as for an act of such superintendent); foot-note appended to *Mosnat v. Chicago, etc., Ry. Co.* (Iowa.), 21 Am. & Eng. R. Cas.,

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miles apart, as required by Acts 1891-92, p. 969, c. 614, § 9 [Va. Code 1904, p. 672, § 1294d], where the accident occurred within less than 10 miles of a telegraph station, and before the train had reached another station where such an office was kept or required to be kept, and a strict compliance with the act would not have avoided the accident.

Same—Making Up of Train Changed by Conductor—Fellow Servants.†—Where a train properly made up at the starting point was afterwards changed by the conductor, a fellow servant, without authority, and in violation of the company's rules, the company was not negligent because the train was improperly and dangerously made up.

Same—Collision—Making Up of Train—Warnings—Knowledge of Company.—Negligence in failing to give a train in advance special warning orders of a train following, which was dangerously made up, is not shown where it is not proven to have been the company's duty to notify such trains, and the dangerous make up was not known.

Contributory Negligence—Failure to Comply with Rule—Danger Signals—Defective Engine—Concurring Negligence.‡—Where the proximate cause of a decedent's death by collision was his own failure to comply with the company's rules regarding the placing of danger signals, the company's negligence, if any, in using an engine in an imperfect condition, did not make it liable, as it was not a case of concurring negligence.

Error to Circuit Court, Prince William County.

Action by the administrator of Walter E. Driver against the Southern Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Roller & Martz, R. A. Hutchinson, Marshall McCormick, and Sipe & Harris, for plaintiff in error.

R. Walton Moore, for defendant in error.

BUCHANAN, J. This action was brought by the personal representative of Walter E. Driver to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the Southern Railway Company prior to the constitutional and statutory changes made in the law of master and servant.

The deceased was the flagman (rear brakeman) on an extra freight train, No. 546, composed of 11 loaded and 4 empty cars, which left Manassas for Strasburg at 3:50 a. m., November 15, 1901, on a single-track, unblocked branch line of the defendant company, which is used day and night for the movement of scheduled and unscheduled trains. From some cause the engine did not steam well that morning, and made very poor speed. When the train reached Wellington, five miles from, and the first station west of, Manassas, it remained there some 25 minutes for the purpose of shifting cars and getting up steam. When the train got under way, it ran about half a mile, when it was stopped again for want of steam for about 10 minutes. After

N. S., 609; *Caron v. Boston, etc., R. Co. (Mass.)*, 5 Am. & Eng. R. Cas., N. S., 705.

†For the authorities in this series on the question whether trainmen of different trains are fellow servants, see foot-notes appended to *Morrison v. Northern Pac. Ry. Co. (Wash.)*, 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233.

‡See foot-notes appended to preceding case.

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getting up steam, it started again, and, having gone a mile or a little more, and while running at the rate of 12 or 15 miles an hour, was run into by another extra train, No. 832, going in the same direction; and the plaintiff's intestate, who was in the caboose at the rear end of train No. 546, was killed. No. 832 was under orders to go to a station west of the point where the accident occurred, and left Manassas from three-quarters to one hour after No. 546 left there. No. 832 was properly made up at Alexandria, its starting point, but when it reached Manassas the conductor in charge of it turned the engine around and placed the caboose in front of the tender, and started the train towards its destination; and while running at the rate of 25 miles an hour ran into No. 546.

The grounds of negligence charged and relied on in the declaration, as stated in the petition for the writ of error, are that the defendant company disregarded the requirements of the statute (Acts 1891-92, p. 969, c. 614, § 9 [Va. Code 1904, p. 672, § 1294d]) as to maintaining and operating telegraph offices for the protection of its train service; in dispatching No. 832 improperly and dangerously made up; in failing to give special warning to No. 832 to proceed under control, and to look out for No. 546; and in failing to give No. 546 special orders that No. 832 was following in its dangerous make up; and in failing to furnish an engine with sufficient power to move No. 546 in the usual way.

The first assignment of error is to the refusal of the court to require the defendant company to file a statement of its ground of defense.

It is insisted by the defendant that this assignment of error cannot be considered, because the ruling of the court complained of was not made a part of the record by a bill of exceptions.

While a bill of exceptions is the usual and regular mode of making the court's action upon such a motion and exception thereto a part of the record, it is not the only mode. The order or judgment of the court may itself show all that would be necessary for a bill of exceptions to show in order to make the matter a part of the record, and if it does it is sufficient. *White v. Toncray*, 9 Leigh, 347; *Mitchell, etc., v. Baratta*, 17 Grat. 445; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

The order of the court shows that the plaintiff moved the court to require the defendant to file a statement of its grounds of defense, that the court overruled his motion, and that the plaintiff excepted to the court's action. This is all that a bill of exceptions would have shown, and is sufficient.

Section 3249 of the Code of 1887 [Va. Code 1904, p. 1709] provides that "in any action or motion the court may order a statement to be filed of the particulars of the claim or of the ground of defense, and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any

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matter not described in the notice, declaration, or other pleading of such party so plainly as to give the adverse party notice of its character."

There is no inflexible rule as to the classes of cases in which a statement of the particulars of the plaintiff's claim or of the defendant's ground of defense will be required, but it rests in the sound judicial discretion of the court. This is the construction which has been placed upon the statute by the Massachusetts courts, from whose Code it was taken. *Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Blake v. Everett, Allen*, 248; *Commonwealth v. Giles*, 1 Gray, 466.

While the question of whether or not such statement shall be required to be filed is within the discretion of the trial court, to be soundly exercised under all the circumstances of the particular case, its action in granting or refusing such request will be supervised by the appellate court; but such action will not be reversed unless it is plainly erroneous. *Hites' Case*, 96 Va. 489, 31 S. E. 895; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

The grounds of defense actually relied on by the defendant were those generally, if not invariably, relied on in such cases out of abundant caution on the part of counsel, viz., that the defendant was not negligent, or, if it was, the proximate cause of the accident was the negligence of the injured employee and his fellow servants. How the refusal of the court to require such a statement as that could have prejudiced the plaintiff we are unable to see.

The second, third, and fourth assignments of error may be considered together. They are all based upon rulings of the court in reference to the improper make-up of No. 832 at Manassas.

There is no question that the conductor, McDonald, directed it to be made up in the condition it was when it left that point. The plaintiff sought to show that the defendant intrusted him with the duty of making up the train, which it is agreed was one of the nonassignable duties of the master. The defendant, on the other hand, claimed that the train was properly made up by the defendant company in Alexandria, the point from which the train started, and, having been made up properly there, the act of the conductor at Manassas in turning the engine around and running it backward with caboose ahead of the tender was without authority of the defendant, and in violation of its rules. The court held that, if the plaintiff could show "authority from the master to change the order of that train at Manassas, why then the master is liable. It was the duty of the master to have sent that train out in proper form at the point of origin. If it was changed without orders, or contrary to the rule of the company, afterwards, they are not liable."

This, we think, was a correct statement of the law. But the plaintiff did not avow that it could show that McDonald was authorized by the company to make the change, nor does the

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evidence which was rejected, as set out in bills of exceptions numbered 1 and 2, when considered in connection with what preceded and followed it, tend to show such authority. It was therefore properly rejected.

The evidence which was permitted to go to the jury over the objection of the plaintiff, as shown by bill of exceptions No. 3, is error at all, was harmless error. It seems to have been a concession all through the case that the change in the make-up of the train at Manassas was done by McDonald's orders. The point in controversy was not as to the fact that he ordered the change, but as to his authority to make it.

The next assignment of error is to the refusal of the court to permit the plaintiff to show that the employees of the defendant habitually disregarded rule No. 99, which provided that: "When a train is stopped at an unusual point or is delayed at a regular stopover three minutes, or when it fails to make its schedule time, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point one-half of a mile (or 18 telegraph poles) from the rear of his train he must put torpedo on the rail on engineman's side; he must then continue to go back at least three-fourths of a mile (or 27 telegraph poles) from the rear of his train and place two torpedoes on the rail ten yards apart from rail length, when he may return to a point one-half of a mile (or 18 telegraph poles) from the rear of train, and he must remain there until recalled, but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedoes nearest the train, but the two torpedoes must be left on the rail as a caution to any following train. If the delay occurs upon single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the front brakeman must go forward and use the same precautions. If the front brakeman is unable to leave the train, the fireman must be sent in his place. In descending grades or during blinding storms or fog, the flagman must go as much farther than the distance named above as will insure absolute safety, placing the torpedoes at relatively greater distances from the obstruction."

The importance of this rule not only appears from the rule itself, but is referred to and emphasized by other rules of the company. The bill of exceptions sets out what the plaintiff expected to prove, but it does not state that he expected to prove that the defendant knew of such violation, or neglected to enforce the rule. On the contrary, the court certifies that certain rules of the defendant (of which No. 99 was one) were admitted and agreed by the parties to be the identical rules in force and effect prior to and at the time of the accident. One of the grounds upon which the court bases its refusal to admit the evidence rejected was that it was not shown that the defendant company had notice of the violation of rule 99.

This was a sufficient ground upon which to justify its action,

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under the facts disclosed, even if the other grounds were insufficient, as to which we express no opinion; for it is settled law that an employee will not be absolved from the imputation of contributory negligence for violating a rule of the master, made for his own as well as for the protection of others, because that rule is habitually disregarded, unless it appears (and the burden is upon the plaintiff to show this) that it was done with the knowledge of the master, or he had so neglected to enforce it as that his conduct amounted to a suspension of the rule. *Wright v. Southern Ry. Co.*, 101 Va. 36, 42 S. E. 913.

The remaining assignment of error is to the action of the court in sustaining the defendant's demurrer to the evidence.

The plaintiff insists that the defendant was guilty of negligence in failing to maintain and operate telegraph offices as required by statute.

By section 9, c. 614, p. 969, Acts 1891-92 [Va. Code 1904, p. 672, § 1294d], it is provided that: "Every railroad company doing business in this state shall establish and maintain along its line, at depots or stations, not more than ten miles apart, telegraphic offices, to be operated for the protection of its train service by competent persons in the employ of such company: provided, however, that the railroad commissioner may grant such company, in special cases, permission to have its telegraphic offices at the distance from each other greater than ten but not more than fifteen miles. It shall be the duty of every such operator to telegraph the arrival and departure of every train, as soon as it shall leave the depot or station, to the train dispatcher or other person regulating the running of trains, and if there be no such persons, then to the nearest telegraph office in the direction in which such train is going. The person receiving the telegram shall forthwith give such order or notification by telegraph as may be necessary to prevent any collision of trains."

The accident occurred within less than 10 miles of Manassas, where there was a station with a telegraph office, and before the train had reached another station where there was such an office kept or required to be kept. If there had been a telegraph office in operation at the next station beyond where the accident occurred and within 10 miles of Manassas, a strict compliance with the provisions of the statute would not have avoided the accident, since the statute imposed no duty upon the defendant as to the train in question until it had reached such station.

Neither was there any negligence shown in dispatching No. 832 improperly and dangerously made up, since the train was properly made up at Alexandria, and was afterwards changed by the conductor, a fellow servant (*N. & W. Ry. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791), without authority, and in violation of the rules of the defendant.

Another ground relied on to show negligence on the part of the defendant, was its failure "to give special warning orders to

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No. 832 to proceed under control, and to keep a lookout for No. 546, and in failing to give No. 546 special warning orders that No. 832 was following in its dangerous make-up." The evidence was that No. 832 was notified that No. 546 was ahead, and to keep a lookout for it. It was not shown to be the duty of the defendant to notify No. 546 that No. 832 was following, and it could not have given any warning of the latter's dangerous make-up because it did not know it.

The remaining charge of negligence on the part of the defendant is "in failing to furnish an engine with sufficient power to move No. 546 in the usual way."

"It would," as was said by the Court of Appeals of New York in *Bajus v. Syracuse Co.*, 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723, "impose upon every railroad company very embarrassing, onerous, and unjust responsibilities, if in the case of accidents with moving trains it was to be the subject of inquiry before a jury whether the particular accident might not have been avoided with an engine of greater or less power. If this engine, drawing a train upon a railroad, had, in consequence of its imperfect condition, become stalled, so that passengers and freight failed to reach their destination in time, or if, when placed at rest, it had run away in consequence of the leakage through its throttle valve, different questions would have been presented for our consideration. But, without violating any rules that have been laid down for the protection of the employees, we are constrained to hold in this case that this was not, as to the plaintiff, a dangerous engine; that it was reasonably safe and proper; and that there was no negligence on the part of the defendant in putting it to the service in which it was employed; and that, therefore, upon the facts as they now appear, the plaintiff has no cause of action against the defendant."

That seems to us to be a correct statement of the rule of law applicable to cases like this. But if the defendant had been guilty of negligence, as to the plaintiff's intestate, in using the engine as it did in its then condition, that negligence was not the proximate cause of the injury, and therefore it was not a case of concurring negligence. *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 792, 40 S. E. 54, and authorities cited. The proximate cause of the death of the plaintiff's unfortunate intestate, as clearly appears from the evidence, was his own failure to comply with rule 99 of the defendant, which made it his duty, when his train was delayed at Wellington more than three minutes, and when it was stopped west of that station at an unusual place, to go back with danger signals to warn any train moving in the same direction. If he had done this, the accident would have been avoided. It is insisted, however, that it is not clearly proved that he did not comply with that rule. We think it is; but, if he did comply with it, then the proximate cause of the accident was the negligence of his fellow servant, the conductor

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on No. 836, in turning his engine around at Manassas and running it backward, with the caboose ahead of it, so that the engineer did not and could not see No. 546 as he approached it. The evidence is uncontradicted that, but for this change in the make-up of the train by the conductor, No. 546 could have been seen, and the collision avoided.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

PEOPLES v. NORTH CAROLINA R. Co.

(Supreme Court of North Carolina, Nov. 30, 1904.)

[49 S. E. Rep. 87.]

Death of Employee on Track—Backing Cars without Warning—Negligence—Question for Jury.—Where, in an action for the death of a train hand, the evidence tended to show that the decedent was killed while attempting to mount a shifting engine, with his back to approaching box cars, which gave no warning of their approach, and which were not manned with a lookout, the question of the company's actionable negligence was for the jury.

Same—Contributory Negligence—Proximate Cause—Unwarranted Instruction.—In an action against a railroad company for the death of a train hand by being struck by cars while mounting a shifting engine coming towards him from the opposite direction, an instruction that if decedent was informed that the cars were to be added to his train, and that the time between the receiving of this information and the time the cars were actually dropped in was short, it was his duty to keep a lookout, and, if he failed to do so, there could be no recovery, was erroneous, because it assumed that the failure to keep a lookout was the proximate cause of the injury.

Same—Same—Burden of Proof.*—The instruction was erroneous because it placed on plaintiff the burden of proving freedom from contributory negligence on the issue of defendant's negligence.

Same—Backing Cars without Warning—Contributory Negligence—Question for Jury.—Where, in an action for the death of a train hand by being struck by moving cars while mounting a shifting engine coming towards him, the evidence for plaintiff showed that decedent was between the tracks, looking towards the approaching engine, and that on the track next to him and back of him were dead cars, which without warning were caused to move and roll down on him as he was making ready to mount the engine, the question of decedent's contributory negligence was for the jury.

Same—Same—Negligence.—Where a train hand was standing on a track, and a number of cars were kicked on the track some 200 yards from where he stood, and rolled down an incline, and collided with detached cars on the same track, and forced the latter against the servant and killed him, and no signal was given, the railway company was guilty of actionable negligence.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by J. M. Peoples, administrator of John B. Peoples, de-

*See foot-notes appended to *Coolbroth v. Pennsylvania R. Co. (Pa.)*, 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419.

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ceased, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for the negligent death of plaintiff's intestate. The issues submitted to the jury were: "(1) Was the plaintiff's intestate injured or killed by the negligence of the defendant's lessee, as alleged in the complaint? (2) Did plaintiff's intestate by his own negligence contribute to his injury and death?"

George F. Bason, for appellant.

Burwell & Cansler and *T. C. Guthrie*, for appellee.

CLARK, C. J. There is an irreconcilable conflict between the version given for plaintiff and for defendant. His honor submitted both phases of the evidence to the jury, and instructed them that, if they should adopt the defendant's version of the facts, they must answer the first issue, "No." The only exceptions are to the refusal to give three prayers for instruction asked by defendant, and fourthly to a paragraph in the charge, and are as follows:

1. Refusal to charge that, if the jury believed the evidence, to answer the first issue, "No." This was properly refused. There was evidence that at the time the intestate was killed he was in the discharge of his duties as an employee of the defendant, with his mind absorbed in the attempt to mount a shifting engine coming towards him, with his back to the approaching box cars, which were giving him no warning of their approach, and which were not properly manned with a lookout upon the leading car. The question whether or not the defendant was negligent in these particulars, and whether such negligence was the proximate cause of the injury, was properly submitted to the jury. *Lassiter v. Railroad*, 133 N. C. 247, 45 S. E. 570; *Smith v. Railroad*, 132 N. C. 824, 44 S. E. 663.

2. The second exception was for refusal to charge that if the jury found that "the intestate was informed that the string of cars was to be added to his train, and that the time between the conversation at which he received this information and when the cars were actually dropped in was short, and he was walking on No. 4 track, it was his duty to keep a sharp lookout for this string of cars, and, if he failed to do so, the answer to the first issue should be, 'No.'" This was properly refused, because the prayer assumed as a fact that intestate's failure to keep a sharp lookout was the proximate cause of the injury. Besides, this prayer was upon the first issue, and seeks to throw upon the plaintiff the burden of proving, not that the defendant was guilty of negligence, but that the intestate was not guilty of contributory negligence. Such instruction would have been clearly erroneous, if given. *Fulp v. Railroad*, 120 N. C. 525, 27 S. E. 74.

3. The third exception is for refusal to charge, "If the jury believe the evidence, the answer to the second issue shall be, 'Yes.'" This was properly refused for reasons given in con-

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sidering the first exception. The plaintiff's evidence was that the intestate was not on the track, but between the tracks; that he was looking in the opposite direction towards his approaching shifting engine, which he was preparing to mount; that on track No. 4, next to him, and towards his rear, were some "dead cars"; and that without warning the defendant "kicked" some cars onto track No. 4, striking the dead cars, and rolling them down on him as he was making ready to get upon his engine; there being no one on the rolling cars or dead cars to give notice of danger.

4. The fourth exception is that the court charged that "if the intestate was standing between the track, and some sixteen cars were kicked on the track some 200 yards or more from this place where the intestate was, and, rolling down an incline, they collided with two detached box cars, with no engine attached, and on the same track that the shifting cars were on, and forcing these two cars against the plaintiff's intestate, in close position to the cars, if that was his position, and, in consequence of that, killing him, and no signal was given, and no agent in charge of this train, this was negligence on the part of the defendant; and, if you are so satisfied that the plaintiff was injured in consequence of this want of care, you ought to answer the first issue, 'Yes.'" We find no error in this instruction. *Smith v. Railroad*, 132 N. C. 819, 44 S. E. 663. This was doubtless the defendant's own view, upon reflection, for he does not refer to this exception in his brief. *State v. Register*, 133 N. C. 746, 46 S. E. 21. Indeed, his brief is chiefly based upon the statement of facts averred by the defendant, and the court charged that, if the jury found that to be the truth of the occurrence, to find the first issue, "No," but the jury responded, "Yes."

No error.

WOOD v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah, Dec. 31, 1904.)

[79 Pac. Rep. 182.]

Injury to Employee—Defective Foreign Car—Evidence—Inspection Record.—In an action against a railroad for injuries to an employee by an alleged defective car from another road, in use by defendant, the record entry of an inspection of the car made by an employee of the road to whom the car belonged, three days after the plaintiff was injured, is inadmissible.

Same—Nonassignable Duties—Appliances.*—The duty of exercising reasonable and ordinary care in providing and maintaining reasonably safe machinery and appliances, imposed on the master by the

*As to what are the duties of a railroad company which it cannot delegate, so as to escape liability to its employees under the fellow servant doctrine, see foot-notes appended to *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544.

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contract of employment, is a personal one, which cannot be delegated so as to release the master from responsibility.

Same—Same—Appliances Received from Other Roads.†—The duty applies as well to machinery and appliances which are not owned by the master, but are received and used in his business, as to machinery and appliances owned by him.

Same—Defective Car—Inspection—Instruction Not Warranted by Evidence.—In an action against a railroad for injuries to an employee by an alleged defective car, where the only evidence as to an inspection of the car by defendant was the testimony of defendant's inspector, which showed that he did not know what was done by him in making the inspection, an instruction to find for defendant if the duty of inspection was performed with reasonable care before the plaintiff was injured was unwarranted by the evidence.

Instructions.—Where correct instructions are first given, and afterwards another instruction is given at the request of appellant, which is favorable to him, but which is erroneous and in conflict with the previous ones, the error is not cause for reversal.

Jury Trial—Power of Court.—Though no demand is made by either party for a jury under Rev. St. 1898, § 3129, providing that either party who desires a jury trial must demand it prior to the time of setting the action for trial, or within such reasonable time thereafter as the court may order, or orally in open court at the time of such setting, the court possesses discretionary power to direct a trial by jury; and hence it is not error, where the plaintiff, in open court, on the next day preceding the trial, made the payment and demand for a new list of jurors, authorized by Sess. Laws 1901, p. 154, c. 132, § 1, to order a jury drawn pursuant thereto, and proceed with a trial by jury.

Appeal from District Court, Seventh District; Jacob Johnson, Judge.

Action by Paul Wood against the Rio Grande Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sutherland, Van Cott & Allison, for appellant.

Powers, Straup & Lippman, for respondent.

BASKIN, C. J. This is an action in which the plaintiff seeks to recover damages for injuries alleged to have been caused by the defendant's negligence in failing to furnish the plaintiff, while performing his duties as a servant of the defendant, reasonably safe cars and efficient brakes with which to perform his work, and to inspect the same and see that they were in a reasonably safe condition. The answer denied the alleged negligence, and pleaded assumed risk and contributory negligence by the plaintiff. From the judgment rendered in favor of plaintiff, the defendant appeals.

It appears from the evidence that the car alleged to have been defective belonged to the Canadian Pacific Railroad Company, but was in use by the defendant, and was numbered C. P. 90,727. The plaintiff was injured on June 9, 1902. C. F. Harris, one of defendant's witnesses, on his examination in chief, testified as follows: "I was on duty on the 8th day of June, 1902, and in-

†As to the duty of a railroad company, as master, to furnish safe foreign cars, see foot-note appended to *Anderson v. Erie R. Co.* (N. J.), 8 R. R. R. 19, 31 Am. & Eng. R. Cas., N. S., 19.

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pecting cars at that time. I do not remember particularly inspecting car C. R. 90,727. I was inspecting a number of cars on that day. I keep a record of all the cars that I inspected. The book that you hand me is a copy of that record, and is in my handwriting. When we find any defect in a car, we note the defect opposite the car number. When we find a car in perfect condition, we do not make any entry whatever. That would indicate a clear record for the car, and that there was no defect in it. If there is any defect in the car, it is noted, providing it is not shopable. I mean by that, if it is not in good condition to run, it is required to go to the shop; then I would say 'Shop;' and, if I find any defect, I note that. Turning to my record of June 8, 1902, I find this car No. 90,727, and I can tell from this record that I inspected that car. I did not find anything in relation to it; no defects whatever. The record is right there [indicating the book]. That indicates a clear record." This testimony having been given without any objection, and the witness' attention having been directed to a similar record respecting said car, made by L. R. Rogers, an inspector of the Canadian Pacific Company, of the date of June 12, 1902, three days after the plaintiff was injured, he further testified that: "The record that you hand me now is the record of L. R. Rogers, who was inspector for the C. P. Mr. Rogers, I think, now is in Los Angeles, California. I do not know whether or not he is in Ogden. I know his handwriting, and the entries in the book you have handed me are in Mr. Rogers' handwriting." Whereupon the attorney for the defendant offered the entry relating to said car in evidence. Plaintiff's attorney objected to the introduction of this entry on the grounds, among others, that it was incompetent and not the best evidence. The objection was sustained. The action of the trial court in sustaining the objection was excepted to by defendant, and is assigned as error. Counsel for appellant contend that upon the foregoing showing the rejected entry was admissible, both as original evidence and as part of the *res gestæ*. As the rejected entry was not made by either an officer or agent of the defendant company, and was not made until the third day after the accident, it was not competent as original evidence, nor as a part of the *res gestæ*. It was therefor properly rejected.

Instruction No. 8 given by the court is as follows: "The master must use reasonable care to provide a servant with reasonably safe appliances with which to perform his work, and he must use reasonable care and diligence to keep the same in a reasonably safe condition." And No. 10, given, is as follows: "The court instructs the jury that if they believe that the plaintiff was injured, as alleged in the complaint, while in the performance of his duty in switching cars, then the jury are instructed that the delivery of such car to plaintiff for use raises for his benefit the implication that the defendant had used suitable care and foresight in adopting it as an instrument or means to carry on its business, and that plaintiff could not only rely upon the body of the car and its

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running gear being safe, but he could also presume that the brake on said car was in a reasonably safe condition." Afterwards No. 23, at the request of the appellant, was also given, as follows: "The duty which the defendant owed to its employees with reference to the car in question, if you find that it belonged to another company and was received for transportation over the defendant's lines, as hereinbefore stated, was not that of furnishing reasonably safe appliances for their use in the discharge of their duties, but was that of inspection, merely; and, if you find that this duty of inspection was performed with reasonable care, then the defendant is not liable, even though the appliances were in fact in a defective condition." The first two instructions were excepted to, and the specific exception presented in appellant's brief is that the eighth and tenth instructions are in conflict with the twenty-third instruction. It is settled by numerous decisions of this court that the contract of employment imposes upon the master the duty of exercising reasonable and ordinary care in providing and maintaining reasonably safe machinery and appliances for the employees to work with; that this duty is a personal duty of the master, which cannot be delegated so as to release him from responsibility; and that a failure to perform this duty is the negligence of the master, for which he is liable. *Pool v. Southern Pacific Ry. Co.*, 20 Utah, 210, 58 Pac. 326; *Hill v. Southern Pac. Ry. Co.*, 23 Utah, 94-102, 63 Pac. 814; *Daniels v. Railway Co.*, 6 Utah, 357, 23 Pac. 762, affirmed in *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct 756, 38 L. Ed. 597; *Allen v. Railway Co.*, 7 Utah, 239, 26 Pac. 297; *Chapman v. Railway Co.*, 12 Utah, 30, 41 Pac. 551; *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90. This duty applies as well to machinery and appliances which are not owned by the master, but are received and used in his business, as to machinery and appliances owned by him, and his duty in respect to both are the same. *Texas Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. In the opinion in the last-mentioned case, delivered by Mr. Justice White, it is said: "That it was the duty of the railway company to use reasonable care to see that the cars on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to rely upon this being the case, is two well settled to require any thing but mere statement. That this duty of a railroad, as regards the cars owned by it, exists also as to cars of other railroads received by it, sometimes designated as foreign cars, is also settled. *Baltimore & Potomac Railroad Co. v. Mackey*, 157 U. S. 72, 91, 15 Sup. Ct. 491, 39 L. Ed. 624." The same doctrine is held in the following cases: *C. B. & Q. Ry. v. Avery*, 109 Ill. 314; *Budge v. Morgan's L. & T. R. & S. S. Co. (La.)* 32 South. 535, 58 L. R. A. 333; *Youngblood v. Railroad Co.*, 60 S. C. 9, 19, 38 S. E. 232, 85 Am. St. Rep. 824; *Mateer v. Missouri Pac. Ry. Co. (Mo. Sup.)* 15 S. W. 970; *Bender v. Ry. Co.*, 137 Mo. 240, 37 S. W. 132; *Gottlieb v. N. Y., L. E. & W. Ry. Co.*, 100 N. Y. 462, 3 N.

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E. 344; *Sack v. Dolese*, 35 Ill. App. 636; *St. L. & S. E. Ry. Co. v. Valirius*, 56 Ind. 512; *Union Stockyards v. Goodwin*, 57 Neb. 138, 77 N. W. 357. In the case of *Youngblood v. Railroad Co.*, supra, the trial court refused to charge, as requested by the defendant, that: "If the jury find from the evidence, if there be such evidence, that the cars between which plaintiff is alleged to have been injured were foreign cars (i. e., cars of another company than the defendant company, then it is only required of the defendant to make an ordinary and reasonable inspection of such cars for any defects which may be discernible by an ordinary examination." In the appellate court it was contended on behalf of the defendant in that case "that said request should have been charged unqualifiedly, as it contained a correct statement of the law applicable to the case, and properly drew the distinction between the duty of the defendant with reference to foreign cars and cars of its own, showing that, as to foreign cars, the duty of the railroad company was not that of furnishing proper machinery for service, and keeping the same in repair, but it is one of inspection only, and was performed when the defendant had made a reasonable inspection of such foreign cars for any defects which might be discernible by an ordinary examination; that the charge of the presiding judge with reference to said request was erroneous, in that it ignored the distinction sought to be made, and drew a comparison only as to the inspection of the respective cars, leaving the general proposition of law as to master and servant, as stated in his charge, to apply alike to foreign cars as well as cars of its own." The appellate court, in passing upon defendant's contention, said: "In the first place, there was no testimony from which the jury had the right to infer that they were foreign cars; and, in the second place, the proposition embodied in the request was not sound." That it was the duty of the defendant in this case, as held in the case in 170 U. S. 699, 18 Sup. Ct. 777, 42 L. Ed. 1188, before cited, to "use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to rely upon this being the case, is too well settled to require anything but mere statement." We are clearly of the opinion that the eighth and tenth instructions were warranted by the evidence, and correctly stated the law applicable to the case.

In respect to the twenty-third instruction, there was no evidence upon which to base a finding by the jury that the defendant's duty of inspection was performed with reasonable care before the plaintiff was injured. C. F. Harris, defendant's inspector, was the only witness who testified that any previous inspection had been made. He testified in chief: "I was on duty on the 8th day of June, 1902, and inspecting cars at the time. I do not remember particularly inspecting car C. P. 90,727. I was inspecting a number of cars on that day. I keep a record of all cars that I inspected." The character of the record has already been shown

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herein. On cross-examination he testified: "I have no particular recollection of that car, outside of my record, nor of the number, so that, in testifying, I am relying entirely upon the record that I made then. It was not until yesterday that my attention was called to the fact that there was some trouble about this car." It is not claimed that any inspection, except that referred to by this witness, was made before the accident. What was done by him in making the inspection was not disclosed, and it appears from his statements that he himself did not know, and that only from his reliance upon the record made by him was he enabled to state that he had ever inspected the car at all. While there was a radical conflict in the evidence respecting the condition of the car at the time the plaintiff was injured, there was ample evidence to justify the jury in finding that the car was not reasonably safe, and that, by the exercise of reasonable and ordinary care on the part of the defendant, its dangerous condition could have been discovered. We are clearly of the opinion that the trial court erred in giving the twenty-third instruction, because it was inconsistent with the other two correctly given, was not warranted by the evidence, and misstated the law applicable to the case. This brings us to the consideration of the question as to whether or not reversible error was committed thereby. On behalf of the appellant it is contended that, "where conflicting charges are given, it is to be presumed that the jury may have followed that which is erroneous, and the case should for that reason be reversed." It is reversible error to give conflicting instructions only where either of them is prejudicial to the party who properly takes exceptions thereto; but not so when, as in the case at bar, correct instructions are first given, and afterwards another is given at the request of the party excepting, which is favorable to him, but which is erroneous and in conflict with the previous ones. The giving of the erroneous instruction at the request of the appellant was not reversible error.

The plaintiff having, in open court, on the day next preceding the trial of the case, made the payment and demand for a new list of jurors authorized by section 1, c. 132, p. 154, Sess. Laws 1901, the judge, in pursuance of said section, ordered the sheriff to draw from the jury box the names of 30 jurors. The jury impaneled in the case was composed of persons drawn from the jury box and summoned to appear by the sheriff. The defendant objected to the trial of the case by a jury on the ground that both the plaintiff and defendant had waived a trial by jury, by not having demanded the same as provided by section 3129, Rev. St. 1898. No demand was made by either of the parties in accordance with section 3129. It is contended that, by the failure to demand a jury in accordance with said section, a trial by jury was waived by both parties, and that thereafter the court's jurisdiction was limited to a trial without a jury, and that therefore the trial had was unauthorized and void. In the case of *Whipple v. Preece et al.*, 24 Utah, 364-376,

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67 Pac. 1072, both sides expressly waived a jury, but the court declined to hear the case without one, and thereupon the plaintiff interposed a challenge. This court, in the opinion delivered by Mr. Justice Bartch, said: "It is not claimed that any jurors were unfair or biased. * * * The verdict appears to be the legitimate result of the evidence. The testimony is not such as to indicate that, if the judgment were reversed, the plaintiff could or ought ultimately to recover. under all the facts and circumstances of this case, viewed in the light of the provisions of the statute quoted and referred to, we are of the opinion that a reversal because of the irregularity complained of would not be justified. *Railroad Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604; *Prince v. State*, 3 Stew. & P. 253." We are of the opinion that the court below possessed discretionary authority to direct a trial by jury notwithstanding the parties to the suit may have waived the same.

The other assignments of error being less plausible than those already passed upon, the record fails to disclose any reversible error.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

LOUISVILLE & E. R. CO. v. POULTER'S ADM'R.

(Court of Appeals of Kentucky, Jan. 26, 1905.)

[84 S. W. Rep. 576.]

Change of Venue.—Error cannot be predicated on refusal of application for change of venue, made after the appearance term, neither Ky. St. 1903, § 1095, requiring notice to the adverse party, nor section 1096, requiring verified petition accompanied by affidavits, being complied with.

Same.—No harm from the refusal of change of venue for remarks made in the presence of the petit jury is shown, it not appearing any of such jurors served on the jury in the case.

Same.—Ky. St. 1903, § 1094, allowing a party change of venue for undue influence of his adversary in the county, does not authorize it for influence of the adversary's counsel.

Injury to Employee—Defective Scaffold.—Evidence in an action for injury to an employee from the falling of a scaffold constructed by the employer held sufficient to sustain a finding of negligence in construction.

Same—Same—Contributory Negligence.*—An employee sent to do work on a scaffold is not required to inspect it for defects, and, unless knowing thereof, or unless they are patent or obvious to a person of his experience and understanding, he is not precluded from recovery for injury from the negligent construction of the master.

Appeal from Circuit Court, Oldham County.

"To be officially reported."

*As to the right of a servant to rely on his master's performance of duties, see foot-notes appended to *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564.

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Action by Henry Poulter's administrator against the Louisville & Eastern Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

E. R. Attkisson, O'Neal & O'Neal, and D. H. French, for appellant.

L. W. Gates, R. F. Peak, and S. E. De Haven, for appellee.

SETTLE, J. The appellee, Andrew M. Sea, as administrator of the estate of Henry Poulter, deceased, obtained in the Oldham circuit court a verdict and judgment against the appellant, the Louisville & Eastern Railroad Company, for \$4,000, in damages for the death of his intestate, caused, as alleged in the petition, by the falling of a defectively constructed scaffold used by appellant in erecting a depot at Beard's Station, the interstate being at the time of his death a day laborer and general helper in the work of erecting the depot by employment of appellant. As to the manner of his death it was averred in the petition that while he was assisting other employees of appellant in placing in position for being attached to the depot building a large bracket of 200 pounds' weight, and necessarily standing upon the scaffold for that purpose, that structure broke and fell, thereby precipitating the intestate to the ground, and causing the heavy bracket to fall upon him and fracture his skull, of which he shortly thereafter died. It was further averred in the petition that the scaffold was negligently and improperly constructed by appellant's servants of defective and unsuitable material, and in such a negligent and unskillful manner that when completed it was unfit and dangerous for use by appellant's workmen; and that its defective and dangerous condition was known, or by the exercise of ordinary care could have been known, to appellant and its other servants at work upon the depot, but was unknown, and by the exercise of such care could not have been known, to the intestate. The answer, by specific denial, put in issue the affirmative matter of the petition, pleaded contributory negligence upon the part of the intestate, and that he knew, or by the exercise of ordinary care could have known, of the unsafe condition of the scaffold, if it was unsafe, before he got upon it. The affirmative matter of the answer was controverted by reply, and upon the issues thus formed the parties were put upon trial and proof, with the result stated in the outset of the opinion.

Numerous errors were assigned by appellant in support of its motion for a new trial, but they were regarded by the lower court as insufficient; consequently a new trial was refused. One of the grounds for a new trial was that the court erred in overruling appellant's motion for a change of venue and continuance. The case was tried before a special judge because the regular judge was of counsel for appellee under a contract of employment made before his election. The affidavit of appellant's agent in Oldham county was filed in support of the motion for a continuance and change of venue, in which it was stated that, owing to the

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undue influence of appellee's attorney, the regular judge of the court, appellant could not have a fair trial in the "community"; that the attorney mentioned was elected judge of the court in which the action was then pending at the preceding November election, and had acted as judge of such court during the term then in progress until the day before the calling of this case for trial; and that on the first day of the term the attorney, as judge of the court, in charging the grand jury made to that body, in the hearing of the members of the petit jury summoned for the term, certain improper and inflammatory statements in regard to corporations and the directors of corporations, which are set out in the affidavit; and that the members of the petit jury would naturally be unduly influenced by such language from the judge of the court, and thereby prejudiced against appellant in the trial of its case. The answer of appellant had been filed at the previous term of the court, at which term the cause was continued. The motion for a change of venue and continuance was not therefore made at the appearance term, but at the second term of the court after the institution of the action, and not in fact until the case was called and both the parties had announced ready for trial. Section 1094, Ky. St. 1903, provides: "* * * A party to any civil proceeding, triable by a jury in a circuit court, may have a change of venue when it appears that owing to the undue influence of his adversary in the county, or to the odium which attends himself, or his cause of action or defense, he cannot have a fair trial." Section 1095 provides, "Before an order for a change of venue shall be made, ten days' notice shall be given to the party." Section 1096 provides: "Application for an order for a change of venue must be made by petition, verified by the affidavit of the party, supported by the affidavits of at least two credible housekeepers of the county in which the action is pending. The adverse party may file affidavits controverting the ground relied upon for a change of venue, and the court may hear other evidence for or against the application, and shall exercise a sound discretion in deciding the question." Manifestly, appellant did not comply with the provisions of the several sections of the statute, *supra*, in the matter of its application for a change of venue, as it neither gave the notice nor filed the verified petition, accompanied by the affidavits of two credible housekeepers of the county, required thereby. In filing the affidavit upon which the motion for a change of venue and continuance was based appellant attempted to avail itself of the privilege accorded by section 1103 of the statute, *supra*, which provides: "At the appearance term of a civil suit if a party desires a change of venue, he shall state the facts and reasons therefor in an affidavit, which shall be good cause for a continuance, if deemed sufficient by the court, provided the application for a change of venue be made during the term." Obviously, appellant could not proceed under this section, as it had no application, for the simple and conclusive reason

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that the motion was not made or affidavit filed at the appearance term, but at a subsequent term, and after both parties had announced themselves ready for trial, as before stated. It is therefore evident that the trial court did not err in overruling the motion. But, if this were not so, it is further evident that the affidavit was insufficient to authorize the order asked of the court. The affidavit set forth certain alleged intemperate remarks made by one of appellee's attorneys, now and at the time of the trial judge of the Oldham circuit court, in charging the grand jury. If they were uttered as stated in the affidavit, though in the hearing of the petit jury, their very intemperateness doubtless prevented them from having a hurtful effect upon the minds of the hearers. While it is, in effect, stated in the affidavit that the remarks in question were made in the hearing of the petit jury, some of whom would be taken upon the jury to try appellant's case, it does not appear from the record that any of them in fact served upon the jury.

We think the grounds presented by the affidavit insufficient in another respect. They relate alone to the undue influence of appellee's attorney in the "community" as in the way of appellant's securing a fair trial, whereas the statutory ground for a change of venue is the undue influence of the opposite party in the county. We apprehend it will never be considered that the great or unusual influence or skill of counsel for one of the parties to an action will authorize the granting of a change of venue to the other party, that his case may be tried where the influence of his adversary's counsel would be less powerful.

It is insisted for appellant that the court erred in refusing the peremptory instruction asked by its counsel after the introduction of appellee's evidence. A peremptory instruction would not have been proper unless there was a total failure of proof. According to the evidence, the scaffold by the fall of which appellee's intestate lost his life was constructed under the supervision of appellant's foreman, Wm. Cox, for the use of the workmen engaged in erecting its depots. The scaffold consisted of three upright scantlings six feet west of the depot, with planks called "outriggers," six by three-fourths inches, nailed to each of the upright scantlings and to the building, the planks or outriggers acting as a support for the planks used as a floor of the scaffold. The floor of the scaffold was about seven or eight feet above the ground. The distance between the northwest corner upright of the scaffold to the middle upright was about eight feet, and from the middle upright to the southwest corner was about fourteen feet. While the evidence was conflicting as to the number of braces on the scaffold, there was no conflict as to the fact that the middle outriggers had a knot in it, which was about midway between the end of the outriggers nailed to the middle upright scantling and the end nailed to the door facing of the depot. We think the weight of the evidence showed that the knot greatly weakened the outrigger, which fact, in connec-

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tion with the further facts that the distance between the south corner upright and the middle upright was 14 feet, and that the scaffold was defectively braced, caused it to give way and fall. The proof also conduced to prove that the scaffold as a whole was a frail, unsubstantial, and unsafe structure, defective in material and construction, and unequal to the task of supporting the combined weight of the 200-pound bracket, and from two to four workmen who were required to get upon it to attach the bracket to the depot. In brief, we think it sufficiently shown by the evidence that appellant, through its superintendent, Cox, and other skilled employees then at work upon the depot, was guilty of negligence in thus constructing and maintaining the scaffold, and that it and they knew it to be unsafe and dangerous for use by its employees. Upon the other hand, there was evidence tending to show that the intestate knew or ought to have known of the dangerous construction of the scaffold, as he gave some assistance in erecting it; that is, by the orders of Cox he carried to it from an adjacent point about the depot some of the material used in its construction, and probably gave some other assistance to those by whom it was put up. It appeared, however, from the evidence, that he was a plasterer by trade, and that while he had occasionally done a little rough carpentering, he was practically without knowledge of or skill in that trade. It was for the jury to determine from all the evidence whether he was enough of a carpenter to know, after having given some assistance in erecting the scaffold, that it was defective and dangerous. The several workmen of appellant testified that the intestate was told to support and push the end of the 200-pound bracket that was being adjusted to its place on the depot building, in doing which his proper place was on the floor of the scaffold, just behind one of the workmen who had the brace on his shoulder, but that, instead of remaining on the scaffold, the intestate negligently stood upon a ladder leaning against the scaffold and one of its braces; that his weight upon the ladder caused the brace to give way, as it was fastened with but one nail; and that the giving away of the brace so weakened the supports of the scaffold as to cause it to fall. They also testified that in their opinion if the intestate had remained upon the floor of the scaffold, it would not have fallen, and that he had been warned by the superintendent not to stand upon the ladder. Upon the other hand, two witnesses introduced by appellee—Botts and Casey—testified to the effect that the intestate was not upon the ladder when the scaffold fell, but upon and near the middle of the floor of the scaffold, where it was his duty to be. Botts did not see the scaffold fall, but in passing a very short time before it fell he saw the position of the intestate as described, and Casey said he saw the scaffold fall; and as, according to his testimony, the intestate was still on the floor of the scaffold, and near the middle, when it fell, it is not probable that he got upon the ladder after Botts passed. At any

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rate, Casey testified that he saw the intestate when the scaffold fell, and he was then on the scaffold, and not on the ladder. Upon this point there was, therefore, a conflict of testimony, appellant's proof conducing to show the scaffold fell because of the breaking of the brace by the ladder upon which the intestate was standing, and that he was negligent in thus standing; but the testimony of appellee conduced to show that the fall of the scaffold was not due to that cause, but to its defective construction and inherent weakness, and more especially by the breaking of the outrigger containing the knot. If the jury had believed appellant's testimony, they would have found that the intestate's death was due to his own negligence; but, as they found for appellee, they necessarily did so upon the ground that the evidence introduced in his behalf showed that his death was caused by the negligence of appellant's servants. As it cannot be said that there was no evidence to support the verdict, the giving of the peremptory instruction asked by appellant would have been improper.

We think the instructions given by the court were unobjectionable, except that in one respect they were unduly favorable to appellant, in that they imposed upon the intestate the duty, equal and corresponding to that of the master, to know that the scaffold was safe before going upon it. Such is not the law of the case. Upon the contrary, the correct rule is that the duty of furnishing reasonably safe tools and materials and place to work is primarily upon the master, and that the servant is under no duty to discover such defects; and unless he knows of their existence, or they were patent and obvious to a person of his experience and understanding, he will not be precluded from a recovery for injury resulting from the failure of the master to perform the primary duty referred to. This rule has been repeatedly approved by recent decisions of this court. *Pfisterer v. Peter & Co.*, 78 S. W. 450, 25 Ky. Law Rep. 1605, and cases therein cited. It follows, therefore, that the authorities relied on by counsel for appellant are not in point.

The record does not show the alleged improper statement claimed to have been made by the trial judge to appellant's counsel in the hearing of the jury, or that an exception was taken thereto; consequently we have been unable to consider it. We are also unable to see that any ruling of the court upon the admission or rejection of evidence was prejudicial to the appellant. Nor was there error in the refusal of the court to give the instructions asked by counsel for appellant.

Wherefore the judgment is affirmed.

ILLINOIS CENT. R. CO. *v.* KEEBLER.

(Court of Appeals of Kentucky, Feb. 15, 1905.)

[84 S. W. Rep. 1167.]

Injury to Servant—Obedience to Order to Do Dangerous Work—Liability.*—Where, by reason of defects in the appliances or place, the employer is aware of the danger incident to the work, but directs the employee to perform the same, the employer takes the risk of injury to the employee, although the latter knows of the danger, unless the danger is obvious, and the probable injury imminent.

Same—Release—Consideration—Failure.†—Where an employee sustained serious injury, and, under a custom of the employer to retain in its service injured employees only when they signed releases for their injuries, executed a release for a nominal consideration, but for the actual consideration of being retained in the employer's service, and was discharged the day after he resumed his labor on a fictitious charge, under a design conceived prior to the execution of the release and resumption of labor, the consideration for the release failed, and the employee was entitled to sue for his injuries.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by H. V. Keebler against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wheeler, Hughes & Berry, J. M. Dickinson, and Pirtle & Trabue, for appellant.

Hendrick & Miller, for appellee.

NUNN, J. This appeal is from a judgment of the McCracken circuit court for \$1,250, from which appellant appeals.

The substance of the facts as they appear in the record are as follows: Appellee was engaged as a machinist's helper in the shops of the appellant at Paducah, Ky. In the month of March, 1903, the foreman in charge of the shops directed him to leave the place where he was working as a helper, and go to a machine, in another part of the shop, known as a "drilling machine," used in boring holes in boiler plates. When appellee went to this machine he found that the floor in front of and partly around it had been removed, leaving nothing but the sleepers exposed, which were about 12 inches in width by 4 inches across, and about 2 feet apart, upon which he was required to stand to perform his work. He went to the foreman, and explained the situation, and was directed by him to go to work, and work up some light material; that he would send him assistance in drilling a couple of boiler plates, each weighing about 400 pounds.

*See foot-note appended to *Stewart v. Texas & P. Ry. Co.* (La.), 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158; note appended to *Illinois Cent. R. Co. v. Jones' Adm'r* (Ky.), 12 R. R. R. 372, 35 Am. & Eng. R. Cas., N. S., 372.

†See foot-note appended to *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Tex.), 13 R. R. R. 573, 36 Am. & Eng. R. Cas., N. S., 573.

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Appellant performed this light work, and two assistants were sent him, who remained until he had completed one and had the other on the machine and a "wooden horse," when these assistants were sent to another portion of the shop by the foreman. Appellee, without assistance, drilled the holes along one side of this boiler plate. It then became necessary to turn the plate around to drill holes in the other side, and he went to the foreman, and told him that he needed assistance for this purpose. The foreman told him to go ahead and perform the labor, that he was in a hurry to have that work completed, and that the assistants were busy in another part of the shop at that time. Appellee testified that he then believed he was able to turn this plate by exercising care, and he undertook to do so under the direction of the foreman, and while attempting it, with one end of the plate upon his shoulder, one of his feet slipped off of a sleeper, he fell astride the wooden horse, the boiler plate slipped down upon and severely injured him by producing permanent hernia. He was sent to appellant's hospital, and remained there until the 20th of April, when, believing he was able to resume his labor, he returned to the shops. Before being permitted to work he was sent to one of the officials in charge of the shops and required to sign a writing, the terms of which released the appellant of all liability for this injury, as well as all others he may have received while in its employment. The recited consideration was \$1, and the further consideration, proven without contradiction, that he was to have continuous employment in the service of appellant. It was also proven without contradiction that appellant required its employees to sign such a release, after receiving injuries, before they were allowed to resume work for it. This release was signed on the 20th of April, but it bears date the 4th of April. On the next morning after appellee signed this writing he was discharged by the foreman of the shops for the alleged reason that it had been reported to him that appellee had been bringing beer upon the premises and drinking it there. This appellee denied at the time. He testified, and was not contradicted, that he had never drank any beer or other liquors in the shops or on the premises, and had never brought any there except upon one occasion, which was some time before the signing of this release, and then he was given some money by the machinist in the shop under whom he was working, who told him to go and bring a bottle of beer, which he did; that he did not drink any of it himself. Appellant asks a reversal of this judgment, because, as it claims, appellee's testimony showed that his injuries were the result of his own negligence; that the danger to appellee incident to the performance of the labor at that place was obvious, and in undertaking the performance of it he assumed the risk; also that this written release, signed by the appellee, was a bar to his right of recovery.

It is well settled that if, by reason of defects in the machinery, appliances, or place, the employer is aware of the danger incident

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to the work to be performed under the circumstances, and notwithstanding this he directs the employee to perform the labor, the employer takes the risk, although the employee knew of the danger, unless the danger is so obvious, and the probable injury so imminent, that a reasonably prudent person would not have undertaken it under the circumstances. *Lasch v. Stratton*, 42 S. W. 756, 101 Ky. 672; *Wake & Co. v. Price*, 53 S. W. 519, 22 Ky. Law Rep. 696; and *I. C. R. R. Co. v. Langan*, 76 S. W. 32, 25 Ky. Law Rep. 500. The question as to whether or not the danger in performing this work was so obvious and the probable injury so imminent that none but a reckless person would have undertaken it under the circumstances, was submitted to the jury under proper instructions, and the jury found in favor of appellee. The jury, under instructions not prejudicial to appellant, found that the release referred to was obtained by fraud, and without any consideration, and we are of the opinion that the evidence sustains their verdict, as the reason for his discharge, if there was any, existed prior to the time his signature was obtained, and it is evident appellant intended to discharge him at the time he signed this release. Under the circumstances of this case the one dollar paid him in consideration of a substantial injury was in fact no consideration. The real consideration which induced appellee to sign it was the expectation of continuous employment, and that failed.

Wherefore the judgment of the lower court is affirmed, with damages.

MEEHAN v. GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, Nov. 5, 1904.)

[101 N. W. Rep. 183.]

Expert Testimony.—The opinions of expert witnesses as to which of two or more causes produced a given effect are not admissible in evidence, where the conditions necessary to the operation of the different causes can be described with sufficient clearness, so that the jury can understand them, and intelligently form an opinion.

Two Possible Causes of Injury—Defendant's Negligence—Burden of Proof.—In an action to recover damages for an injury alleged to have been caused by defendant's negligence, where it appears that there were two or more possible causes of the injury, only one of which is chargeable to defendant's negligence, the burden is upon the plaintiff to make it appear that it was more probable that the injury resulted from the cause for which the defendant was responsible.

Master and Servant—Appliances—Degree of Care.*—It is the mas-

*As to the degree of care due from a railroad company to its employees, see foot-note appended to *Scott v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148.

As to the degree of care due from railroad companies in furnishing appliances, see foot-note appended to *Roche v. Denver & R. G. R. Co.* (Colo.), 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955, where all the preceding authorities in this series are collected; *Chapman v. Pere Marquette R. Co.* (Mich.), 8 R. R. R. 661, 31 Am. & Eng. R.

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ter's duty not only to provide proper appliances for the use of his employees, but also to exercise ordinary care to keep the appliances in good repair.

Same—Same—Nonassignable Duties.†—The master's duty to provide proper appliances and to keep them in good repair cannot be delegated so as to avoid personal responsibility for the due performance of the duty.

Same—Same—Defects from Use—Liability.—The master is not liable to his employee for an injury caused by a defect in appliances resulting solely from use, unless the master knew of or ought to have known of and remedied the defect.

Same—Assumption of Risk.—The employee does not assume the risk of injury caused by the master's negligence, where he had no knowledge of the existing danger.

Judgment Notwithstanding Verdict.—To justify an order for judgment notwithstanding the verdict, the record must affirmatively show, not only that the verdict is not justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied on another trial.

(Syllabus by the Court.)

Appeal from District Court, Grand Forks County; C. J. Fisk, Judge.

Action by Daniel Meehan against the Great Northern Railway Company. Verdict for plaintiff. From an order denying judgment notwithstanding the verdict or a new trial, defendant appeals. Reversed.

W. E. Dodge, Wm. R. Begg, and C. J. Murphy, for appellant,
George A. Bangs and P. J. McLaughlin, for respondent.

ENGERUD, J. Plaintiff sued to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant, and obtained a verdict for \$8,000 damages. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from the order denying both motions.

The complaint alleged, in substance, that on April 10, 1902, the plaintiff was the head brakeman on defendant's freight train which ran from Grand Forks to Walhalla and return; that while the train was running between Grafton and Minto on the return trip the plaintiff, while in the discharge of his duties, and exercising due care, was proceeding along the top of the train from the caboose towards the engine, and fell off the end of one of the cars, and received the injuries complained of; that, unknown to plaintiff, the train had broken in two, and he fell off of the front

Cas., N. S., 661; *Bodie v. Charleston & W. C. Ry. Co.* (S. Car.), 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95; *Pennsylvania Co. v. Fishack* (C. C. A.), 9 R. R. R. 85, 32 Am. & Eng. R. Cas., N. S., 85.

†As to what are the duties of a railroad company which it cannot delegate, so as to escape liability for injuries to its employees under the fellow servant rule, see foot-notes appended to *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544.

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end of the rear portion because of the unexpected break in the train. The particular negligence complained of as the proximate cause of the injury is, in substance, that the couplings on the two cars which separated were so imperfectly constructed, and were so twisted and broken, worn and out of repair, that they became disconnected, and thus caused the train to break in two.

The defenses relied upon are that there was no negligence on the part of defendant; contributory negligence on the part of plaintiff; and that the injury resulted from a danger incident to the business, the risk of which the plaintiff assumed by his contract of employment.

The evidence shows that while the freight train in question upon which plaintiff was employed as head brakeman was running from Grafton to Minto, at about 11 o'clock on the night of April 10, 1902, the train parted near the middle. The train consisted of about 40 cars. The engineer and fireman did not notice the break, and went on with the front portion of the train to Minto, a distance of about 10 miles from Grafton, before they discovered that the train had parted. The rear portion, upon which the plaintiff was riding, traveled on, with gradually diminishing speed, until it came to a stop about 4½ miles from Grafton. The plaintiff's post of duty was at the front end of the train, but he had got into the caboose when the train pulled out of Grafton, and stayed in the caboose long enough to eat his lunch. After eating his lunch he started for the front end of the train, and in order to do so he had to pass over the tops of the cars between the caboose and the engine. When he reached the front end of the detached portion of the train, he discovered the break, but, as he claims, too late to save himself, and consequently walked or fell off the front end of the front car, and was injured. After he fell, the detached part of the train moved only five or six feet before coming to a stop. All the cars in the train were equipped with the automatic couplers in common use on such trains. The couplers between the rear car of the front part of the train and the front car of the rear portion of the train had in some manner become disconnected. It is conceded that such couplers as those in question may, and, not infrequently do, part by reason of any one of three causes: (1) By slipping apart by reason of wear; (2) by the pin "pinching" up so as to permit the knuckles to unlock; (3) by the "jumping" of the drawbars one above the other. The first, only, of the above three causes, under the facts of this case, can be attributed to defendant's negligence. Under such circumstances mere proof of the accident does not cast upon defendant the burden of showing the real cause of the injury and negating possible negligence. The burden of proof was upon the plaintiff to prove by a preponderance of the evidence that the parting of the train was due to the wear of the couplers. *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *Smith v. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Kinkhead v. Ry. Co. (Or.)* 29 Pac. 3. Immediately after the accident the drawbars and couplers which parted

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were examined by the conductor. He testified as a witness for plaintiff, and his testimony is the only direct evidence in the case as to the condition of the drawbars and couplers at the time of the accident. He testified, in substance, that the drawbars and couplers were in good order; that they showed only such wear as usually appears when couplers are in use, but not sufficient to permit the couplers to slip apart. No direct proof was made except that of the conductor as to what extent the couplers were worn, or that the wear in any way rendered the couplers unsafe or unfit for the use to which they were put. Plaintiff sought to make this proof by opinion evidence, and several assignments of error relied upon by appellant are predicated upon the rulings admitting these opinions. The following questions and answers fairly disclose the line of inquiry objected to. Plaintiff was asked: "Q. In view of the smooth condition of the tract, the condition of the couplers as testified to by Mr. Ingersoll [the conductor], the rate of speed at which this train at any time was moving prior to the time it parted in two, I will ask you to state, from your knowledge and experience as a brakeman, whether or not the train could have parted if the knuckles had not been in a worn condition. A. No, they could not." One Kingsley, who had had several years' experience as a brakeman and conductor, was sworn as a witness for plaintiff. He had no personal knowledge of the accident, or the facts and circumstances surrounding it. Plaintiff's version of the facts testified to were recited to him, and he was asked to state whether, in his opinion, the train parted by reason of the worn condition of the couplers. He answered in the affirmative. Aside from the testimony of the conductor above set forth, the only facts upon which to base the opinions of these witnesses was certain testimony to the effect that the highest rate of speed of the train between Grafton and Minto was eight to ten miles per hour; that sags or depressions in the tract may cause couplers to part by "jumping" one above the other. there is no proof that sags or depressions are the only cause which may account for couplers "jumping" apart. The plaintiff testified that the track between Grafton and the place of the accident was "smooth and level"; that sags or depressions are easily detected by trainmen when the train is in motion, and that he did not notice any.

It will be seen from the foregoing that these witnesses were permitted to give their opinions upon a vital issue in the case, which was to be determined by the jury. They were not testifying to facts within their knowledge, but simply expressed opinions as to what conclusions should be drawn from the facts. Our views on the subject are accurately expressed by the following quotation from the opinion of Judge Earl in *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544: "The general rule of law is that witnesses must state facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions, among which is expert evidence. * * * It is not

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sufficient, to warrant the introduction of expert evidence, that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but, to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses, or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them, and comprehend them sufficiently for the ordinary administration of justice. The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and, if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts." See, also, *Muldowney v. Ry. Co.*, 36 Iowa, 462; *Bemis v. R. R. Co.*, 58 Vt. 636, 3 Atl. 531. If these witnesses had learned from their experience as railroad men what various causes might make these couplers separate, and what conditions were essential to set these several causes in operation, they would be qualified to testify as experts, and inform the jury under what conditions each cause would or would not operate. With this information before them, the jury were as well qualified to determine the cause of the break in the train as the expert witnesses. The conditions under which these causes might operate were not of such a nature that they could not be adequately described with sufficient clearness to enable a person of average intelligence to understand them. There was no occasion or necessity for the opinions objected to, and the testimony should have been excluded. The admission of this testimony was clearly prejudicial, and the defendant's motion for a new trial should have been granted.

Appellant, however, insists that it is entitled to judgment notwithstanding the verdict, under chapter 63, p. 74, Laws 1901.

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It is contended that the evidence in this case is insufficient to establish any negligence on defendant's part; that it shows that the injury was due to plaintiff's own want of care, and that the injury resulted from a hazard of the business the risk of which plaintiff assumed by his contract of employment; that defendant's motion for a directed verdict on these grounds should have been granted, and hence that a judgment notwithstanding the verdict should be ordered. Judgment notwithstanding the verdict is not warranted in every case where a directed verdict has been erroneously denied. To justify such judgment, the record must affirmatively show not only that the verdict is not justified by the evidence, but it must also appear from the nature of the case and the circumstances connected with it, that there is no reasonable probability that upon another trial the defects in or objections to the proof necessary to support the verdict may be remedied. *Richmire v. Elevator Co.*, 11 N. D. 453, 92 N. W. 819; *Ætna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Merritt v. Ry. Co. (Minn.)* 84 N. W. 321. The record before us tends rather to suggest than to negative the probability of additional evidence being produced on another trial relative to the question of defendant's alleged negligence and plaintiff's alleged want of care. Such additional evidence, if furnished, may supply the present insufficiency of proof of the former and overcome the inferences which it is claimed establish contributory negligence. If the injury was proximately caused by defective couplers, and the defect was due to defendant's negligence, it is clear, under the circumstances disclosed by the evidence before us, that the plaintiff did not assume the risk of injury from that cause. It is not claimed that he knew of the alleged defects in the couplers, nor is it claimed that the defendant habitually used defective couplers. An employee does not assume the risk of injury from an unknown danger caused by the master's negligence. *Woutilla v. Lumber Co.*, 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; *Southern Pac. Ry. Co. v. Yeagin*, 109 Fed. 436, 48 C. C. A. 497; *Dorsey v. Construction Co.*, 42 Wis. 583; *Green v. Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785. Although we are agreed that there was an insufficiency of competent testimony to establish negligence on defendant's part, and that a motion for a directed verdict on that ground should have been granted, yet, for the reasons above stated, the motion for judgment notwithstanding the verdict was properly denied.

As a guide in the future disposition of this case, we will state briefly the reasons why we deem the evidence insufficient to establish defendant's negligence. Under the circumstances disclosed by the evidence in this case, and assuming that the parting of the couplers was the proximate cause of the injury, it is essential to plaintiff's right to recover that he established by a preponderance of the evidence two facts: (1) That the train parted by reason of defective couplers; (2) that the defect in the couplers was known, or ought to have been known, to the defendant. The

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complaint charged the defendant with negligence in this: That the defendant had omitted to perform the duty which it, as master, owed to its employees to furnish proper appliances and to keep them in repair. It was undisputed that the first part of this duty had been performed. The couplers were free from defects when originally placed in the cars. It is claimed, however, that they had become unfit for use by wear. It is not claimed that the defendant, or any of its agents, servants, or employees, had knowledge of the unsafe condition of the couplers. With respect to the master's duty to keep appliances in repair for the use of his employees the rule is that the master must use ordinary care (such care as a prudent man would ordinarily exercise), and such diligence, in the way of inspection, to detect the need of repairs, as reasonable prudence ordinarily requires, in view of the circumstances attending the use of the appliances in question. Rev. Codes 1899, § 4097; *Cameron v. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Deppe v. Ry. Co.*, 36 Iowa, 52; *Anderson v. Ry. Co.*, 107 Mich. 591, 65 N. W. 585; *Park Hotel Co. v. Lockhart*, 59 Ark. 465, 28 S. W. 23; *Carruthers v. Ry. Co.*, 55 Kan. 600, 40 Pac. 915; *Tuck v. Ry. Co. (Ala.)*, 12 South. 168; *Moon v. Ry. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; *Smith v. Ry. Co.*, 42 Wis. 520. This duty cannot be delegated so as to relieve the master from personal responsibility for its due performance. *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Union Pacific Ry. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. Applying these rules to this case, even if we assume that the couplers parted by reason of wear, we find no evidence sufficient to warrant the conclusion that the defendant had omitted its duty with respect to repair. It follows, from the rules we have stated, that a master is not liable for his employee's injury, caused by the appliance becoming out of repair, when the defect is unknown to the master, unless it is shown that the defect ought to have been discovered and remedied if the master had performed his duty to exercise reasonable prudence and ordinary care to detect and remedy such defect. The mere fact that an injury is caused by defective appliances does not prove negligence unless the defect is of such a nature that reasonable prudence and ordinary care ought to have discovered it. In this case there is no direct evidence as to the extent of the wear except that of the conductor. Although his testimony tends to negative the fact, the plaintiff sought to have the jury infer from circumstantial and opinion evidence not only that the wear was sufficient to permit the couplers to slip apart, but also to go further, and from the first inference draw the further conclusion that the wear was of such extent that the defendant ought to have discovered and remedied it. Such attenuated inferences cannot take the place of evidence. The evidence is equally unsatisfactory as to the cause of the parting of the couplers. It would serve no useful purpose to discuss it in detail.

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Suffice it to say that, after eliminating the objectionable opinion evidence, there is not sufficient evidence from which it can be determined which of the three possible causes brought about the accident. It was not necessary for the plaintiff to exclude the possibility of the nonnegligent causes, but it was incumbent on him to furnish proof, direct or circumstantial, sufficient to reasonably justify the conclusion that there was a greater probability that defective couplers caused the accident than that either of the other two possible causes produced the result. *Cameron v. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927; *Shearman & Redfield on Negligence*, §§ 57, 58; *Wason v. West* (Me.) 3 Atl. 911.

The order denying the motion for a new trial is reversed, and a new trial ordered. All concur.

WARREN & O. V. R. Co. v. GARRISON.

(Supreme Court of Arkansas, Feb. 4, 1905.)

[85 S. W. Rep. 81.]

Easements—Tramway—Right of Way—Construction of Conveyance.—A conveyance of a right of way for a wooden tramway over certain land operated as a conveyance of a mere easement to operate the tramway only, and did not authorize the grantee's successors in interest to use the same for the construction of a steam railway.

Same—Same—Construction of Steam Railroad—Estoppel.—Where the owner of certain land subject to an easement for the construction of a wooden tramway stood by and permitted defendant to construct a steam railroad thereon, she was estopped to maintain ejectment to recover the land, and was restricted to compensation for injuries sustained.

Appeal from Circuit Court, Bradley County, in Chancery; Zachariah T. Wood, Judge.

Suit by S. S. Garrison against the Warren & Ouachita Valley Railroad Company. From a judgment in favor of complainant, defendant appeals. Affirmed.

Austin & Danaher and *Fred. L. Purcell*, for appellant.

Wells & Williamson, for appellee.

BATTLE, J. This is a suit to cancel a certain deed by Susan B. Garrison to S. L. Howard and deed by Howard to Warren & Ouachita Valley Railroad Company.

On the 7th day of November, 1895, Mrs. Susan B. Garrison conveyed to Howard a right of way for a wooden tramway over certain lands belonging to her. A tramway was constructed. Afterwards, on the 26th day of May, 1899, Howard conveyed the right of way to the railroad company, and it laid an iron and steel track over the same for running locomotives and trains over the same, and used and is now using it for that purpose.

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This suit is instituted to set aside the deeds referred to. The chancery court canceled the deed of Mrs. Garrison, and the railroad company appealed.

The deed of Mrs. Garrison conveyed to Howard only an easement, which was the right to construct and operate a wooden tramway over certain lands. Howard or his assigns had no right to increase the servitude of the land by constructing and operating a steam railway over it. A conveyance of the right of way for a wooden tramway did not vest any such right. The operation of a tramway does not affect the value of adjacent land as much as the operation of the steam railway. The insecurity of live stock, and persons, and the inconvenience and annoyance incident to the operation of the latter, does not attend the former. Hence the right of way for the tramway does not imply the right to construct and operate the railroad. The owner of the land might be willing to waive compensation for the first when he would not for the latter; and the compensation for the first would not be sufficient for the latter.

The decree of the chancery court is not prejudicial to appellant. It does not increase the damages for which it is liable. Appellee cannot dispossess it. Having stood by and permitted it to go on and construct its road and expend its money, she is estopped from maintaining ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to compensation for the injuries she has suffered. *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

We find no reversible error in the proceedings of the chancery court, and the decree is affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err., v. WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD *et al.*

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err., v. WILLIAM S. ELY *et al.*

(Submitted December 15, 1904. Decided February 20, 1905.)

[25 Sup. Ct. Rep. 302.]

Error to State Court—Formality of Writ of Error—Description of Judgment.—A writ of error to a state court, which incorrectly states the date of the judgment in the court below, may be dismissed without prejudice to proceedings under a second writ of error, which correctly describes the judgment.

Adverse Possession—Railroad Right of Way.*—Title to the right of

*As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see foot-note appended to *Bubenzer v. Philadelphia, B. & W. R. Co.* (Del. Ch.), 12 R. R. R. 214, 35 Am. & Eng. R. Cas., N. S., 214; foot-notes appended to *Chicago, B. & Q. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561.

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way granted by Congress to the Northern Pacific Railroad Company for the construction of its road cannot be acquired by adverse possession for private use under a state statute of limitations except so far as the land so adversely held was so situated that a conveyance from the grantee company or its successor would have been confirmed by the act of April 28, 1904, validating such conveyances of the right of way as should not diminish it to a less width than 100 feet on each side of the center of the main track.

Two writs of error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Spokane County, in that State, in favor of defendants in a suit to quiet title, remove clouds, and recover possession of certain real property alleged to be portions of a railroad right of way. Writ of error in No. 88 dismissed; judgment reversed in No. 102, and cause remanded for further proceedings.

See same case below, 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766, 65 Pac. 555.

The facts are stated in the opinion.

Messrs. C. W. Bunn and James B. Kerr, for plaintiff in error.

Messrs. Harold Preston, William E. Cullen, F. T. Post, and Samuel R. Stern, for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a suit brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, in the superior court of the county of Spokane, state of Washington, against a large number of persons, to quiet title, remove clouds, and recover possession of certain parcels of real estate, alleged to be portion of its right of way in that county.

The complaint alleged that plaintiff was the owner and entitled to a strip of land, 400 feet wide, on which defendants had wrongfully entered. Some of the defendants were defaulted. Separate answers were interposed by others, separate trials had, separate verdicts rendered, and bill of exceptions granted. As to one defendant, the case was submitted to the court for trial, and findings of fact and conclusions of law were made and filed.

A single decree was rendered in favor of contesting defendants, from which the railway company appealed to the supreme court of the state, where the decree was affirmed. 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766, 65 Pac. 555.

The opinion of that court was filed June 29, 1901, and judgment of affirmance entered July 30, 1901. On May 4, 1903, the case of *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671, was decided. May 28, 1903, the railway company was allowed a writ of error from this court, the judgment of the state supreme court being described as entered June 29, 1901. The case was docketed July 23, 1903, and is now numbered 88. June 30 a second writ of error was

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taken out and filed below, the papers correctly describing the judgment as entered July 30, 1901, and was docketed here August 13, 1903, and is now numbered 102.

Plaintiff moved for leave to amend the record in No. 88 so that the date of the judgment might be correctly given, and that thereupon No. 102 be dismissed, or, in the alternative, that No. 88 be dismissed. We grant the latter application, and dismiss No. 88 without prejudice to proceeding in No. 102. *Wheeler v. Harris*, 13 Wall. 51, 20 Ed. 531; *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822.

The facts on which the state supreme court proceeded are thus stated:

"It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad had been continuously operated since its construction. The defendants, answering, claim title by patent from the United States government. The land was acquired under the pre-emption and homestead acts, respectively, and all the defendants or their grantors have been in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvement which these defendants have made upon their lots,

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many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant, and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees."

It may be added that it was only as to some of the parcels that the filing of the map of definite location and the construction of the railroad preceded the filing of the entries. But we regard the case as falling within the rule holding the grant of the right of way effective from the date of the act. *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578.

The supreme court held that the action was barred by the statute of limitations; that the company was estopped from asserting title by reason of the circumstances; and that: "Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the government has ripened into title by adverse possession, the company cannot set up the defense that the right of way was granted for public purposes only, and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations."

As before stated, on the 4th day of May, 1903, the decision of this court in *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671, was announced. We there ruled that individuals could not, for private purposes, acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a state was amenable to the police power of the state. And we said: "Congress must have assumed, when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

We are not prepared to overrule that decision, and tested by it, the judgment in this case must be reversed. But we were then dealing with the original right of way, which was of a

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width of 400 feet. April 28, 1904, an act of Congress entitled "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company," was approved (33 Stat. at L. 538, chap. 1782), reading as follows:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the government by any act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

"Sec. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The terms and provisions of the act were accepted by the railway company June 22, 1904, and the acceptance, duly certified, was filed in the Interior Department July 7, 1904.

In *Townsend's Case* it was said, among other things:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted . . . Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated, without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company." 190 U. S. 271, 272, 47 L. Ed. 1046, 1047, 23 Sup. Ct. Rep. 672, 673.

The act of April 28, 1904, in view of our decision in that case, was obviously intended to and did have the effect to narrow the right of way to 200 feet in width, so far, at least, as, outside of that strip, the original right of way had been parted with.

The rule in the state of Washington as to adverse possession is thus stated by the supreme court in this case:

"One holding land adversely to the rights of another can be

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devested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under a void grant of sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, 5th Ed. p. 176:

“The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.” 25 Wash. 388, 54 L. R. A. 530, 87 Am. St. Rep. 768, 65 Pac. 556.

In *Sharon v. Tucker*, 144 U. S. 533, 543, 36 L. Ed. 532, 535, 12 Sup. Ct. Rep. 720, 722, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the court, said:

“It is now well settled that, by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner, should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261; *Campbell v. Holt*, 115 U. S. 620, 623, 29 L. Ed. 483, 485, 6 Sup. Ct. Rep. 209.”

This was quoted in *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 538, 48 L. Ed. 291, 292, 24 Sup. Ct. Rep. 166, 167, and it was remarked:

“Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance.”

So far as the title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the supreme court had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial, and to be construed accordingly. The lots of some of the defendants were outside of the 200 feet. The lots of others were partly within and partly without the strip. But the act was passed after the judgment of the supreme court was rendered, and while the case was pending here, and it must be left to the state courts to deal with the matter in the light of the conclusions at which we have arrived.

In *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550,

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which was a writ of error to the supreme court of the territory of Colorado, the act authorizing the action was repealed while the writ was pending in this court, and we, in the exercise of appellate jurisdiction, declined to send the case back to the court below with instructions to enter a judgment of nonsuit, and affirmed the judgment because we found no error.

In the present case, the parties will not be compelled to resort to some form of original proceeding to obtain relief under the act of April 28, 1904, as, apart from that statute, the decree must be reversed, and thereupon the record will be open for such adjudication as the then situation may demand.

In No. 88, writ of error dismissed; in No. 102, decree reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Harlan was of opinion that the decree of the state supreme court should be affirmed for the reasons given, and, therefore, dissented.

PETERSON *et al.* v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota, Feb. 21, 1905.)

[102 N. W. Rep. 595.]

Evidence—Temperature—Where weather conditions are exceptional, the impression of witnesses as to temperature may be given in general terms; but, unless it is shown that resort to thermometers is impracticable, testimony concerning temperature can be expressed only in thermometric degrees as observed by the witness or recorded by signal service officers.

Carriage of Live Stock—Action for Injury—Watering Stock—Presumption.—In an action against a railroad for injuries to stock in transit it will be assumed, in the absence of evidence to the contrary, that the railroad's employees did their duty in watering the stock.

Same—Failure to Water—Sufficiency of Evidence.^{*}—In an action against a railroad for injury to hogs in transit, evidence held insufficient to show that defendant's employees negligently failed to "wet down" the hogs, or that ordinary care was not taken of them.

Same—Same—Same—Proximate Cause.—In an action against a railroad for injury to hogs in transit, evidence held insufficient to show that defendant's failure to "wet down" the hogs was the proximate cause of the injury.

Same—Negligence—Proximate Cause—Burden of Proof.^{*}—In an action against a railroad for injury to stock in transit, the burden is on plaintiffs to establish that the negligence alleged was the proximate cause of the injury.

^{*}As to the burden of proving negligence on the part of the carrier where freight is lost or injured, see *Boston & M. R. R. v. Sargent* (N. H.), 12 R. R. R. 459, 35 Am. & Eng. R. Cas., N. S., 459 (burden of proof on all the issues was on the railroad, in an action by it against the shipper for the latter's negligent maintenance of a stove in a car, although the shipper had exclusive control of the interior of the car); *Pennsylvania R. Co. v. Naive* (Tenn.), 12 R.

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Appeal from Circuit Court, Minnehaha County.

Action by G. R. Peterson and another, co-partners as Peterson Bros., against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiffs and from an order denying a new trial, defendant appeals. Reversed.

Porter & King (H. H. Field, of counsel), for appellant.
Winsor & McNaughton, for respondents.

HANEY, J. On June 24, 1901, the plaintiffs delivered to the defendant a car load of live hogs for shipment from defendant's station at Renner, S. D., to its station at Sioux City, Iowa. The hogs were loaded at 8 o'clock in the evening. The car in which they were carried reached Sioux City at 6:30 the following morning, was turned over to the Union Terminal Company, which pulled it into the stockyards at 8:16, and when unloaded about 20 minutes later 19 of the hogs were dead. To recover compensation for the loss thus occasioned this action was instituted, its trial resulting in a verdict in favor of the plaintiffs. Judgment having been entered, and a new trial refused, the defendant appealed.

It is alleged in the complaint "that the defendant was negligent in removing said hogs from Renner in not commencing the transportation of said hogs for several hours after the same had been loaded and delivered to said defendant at about 8 o'clock p. m., of said 24th day of June, 1901, and that defendant was further negligent in not watering down and cooling said hogs while transporting them, as before alleged, from said Renner to said Sioux City," and "that the 19 hogs which so died, as heretofore alleged, were of the value of \$255.47 when delivered to defendant, and when delivered to plaintiffs' consignees at said Sioux City, as before alleged, they were only of the value of \$32.47." These allegations are denied by the answer, wherein it is averred "that the said hogs were received for transportation

R. R. 126, 35 Am. & Eng. R. Cas., N. S., 126 (presumption of negligence where goods are damaged while in carrier's possession); *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504 (presumption that goods were lost through negligence); note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; foot-notes appended to *Nelson v. Great Northern Ry. Co.* (Mont.), 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311 (where shipper accompanies stock); *Bosley v. Baltimore & O. R. Co.* (W. Va.), 10 R. R. R. 458, 33 Am. & Eng. R. Cas., N. S., 458 (presumption of negligence from delay); note, 18 Am. & Eng. R. Cas., N. S., 423; *Grieve v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 669; *Mitchell v. Carolina Cent. R. Co.* (N. Car.), 13 Am. & Eng. R. Cas., N. S., 201; *Norfolk & W. Ry. Co. v. Reeves* (Va.), 16 Am. & Eng. R. Cas., N. S., 166; *Central of Georgia Ry. Co. v. Howard* (Ga.), 21 Am. & Eng. R. Cas., N. S., 15 (where stock is injured in transit); *Cooper v. Raleigh & G. R. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 412; *Cau v. Texas & Pac. Ry. Co.* (U. S.), 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303 (burden of proving carrier's liability where the contract of shipment limits its liability).

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and transported by the defendant and delivered under and by virtue of the terms of a certain written contract executed on or about the 24th day of June, 1901, by and between the said plaintiffs and defendant, and not otherwise; that among the agreements, stipulations, and conditions contained in said contract were the following, to wit: First. That the company shall not be liable as an insurer of the live stock transported under this agreement. Second. That the company shall not be liable for the acts of the animals to themselves or to each other, such as biting, kicking, goring, or smothering, nor for loss or damage arising from the condition of the animals, nor from their jumping from the cars, nor from loading or unloading them. Third. That the company shall not be liable for injury or damage to said stock by or on account of the delay thereof during its transportation, and it does not agree to deliver said stock at destination at any specified time." The evidence disclosed no delay in transporting the property, and the existence of a written contract containing the alleged stipulations; hence only two issues remained at the close of the trial, namely, whether defendant's failure to "wet down" the animals caused their death, and the amount of plaintiffs' recovery, if entitled to recover at all.

Under the charge of the learned circuit court the verdict can be sustained only on the theory that the plaintiffs proved by a fair preponderance of the evidence that defendant's failure to "wet down" the hogs while in transit on its own lines was the proximate cause of their loss. It is contended that the evidence is insufficient to support such conclusion. The distance between Renner and Sioux City is admitted to be about 95 miles. An employee of the plaintiffs testified that he loaded the hogs about 8 o'clock in the evening, that they were "wet down" before being put in the car, and that they were then in good condition. Defendant's conductor and brakeman testified that the animals were "wet down" at Sioux Falls about midnight, and at Hudson about 4 o'clock in the morning, and that the weather became cooler after leaving Hudson. Blookington, an employee of the consignee, testified, in substance, as follows: "I have been unloading hogs for twenty years. From my experience and observation I can tell from the appearance of a car when received at the stockyards whether the hogs have been 'wet down' within a few hours. I did not see these hogs until they got to the chute. That was 8:16. I examined the car when I unloaded it. It was very dry. Nineteen hogs were dead. Those not dead were very hot. The weather was warm, hot." Though claiming ability to determine from the appearance of the car whether or not the hogs had been "wet down within a few hours," Blookington was not asked to give an opinion concerning the car in question. Had he been, his testimony could not have conflicted with that of defendant's employees, because they did not swear that the animals had been watered within four hours of their arrival at the stockyards. The conductor and brakeman were not impeached

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by cross-examination or otherwise. Two witnesses swore the animals were watered at Sioux Falls and Hudson. One witness swore 19 of them were dead when the car reached the stock-yards. The latter fact can be ignored as easily as the former. It is usually cooler at night than in the daytime. It does not appear that this night was exceptionally warm. Blookington says the following morning was "warm, hot." What one person considers hot may be regarded as cool and comfortable by another. Where weather conditions are exceptional, the impressions of witnesses may be given in general terms, but reliable testimony concerning temperature can be expressed only in degrees as observed by the witness or recorded by signal service officers. The best evidence should always be produced, or its absence accounted for. Where thermometers are so plentiful and signal stations so numerous as they are in this age and country, courts and juries should not be required to depend upon loose expressions of opinion, unless it appears that resort to more reliable sources of information is impracticable. No attempt was made to show how often the animals should have been watered while in transit. In the absence of evidence to the contrary, it should be assumed that defendant's employees did their duty—that they watered the hogs as often as the circumstances required. Negligence cannot be presumed. So we say there was no evidence which justified the conclusion that ordinary care was not taken of the stock while in transit on defendant's lines.

And there is another respect in which the evidence is insufficient. Excluding the testimony of defendant's employees, and giving full force and effect to plaintiffs' evidence, it is not shown that defendant's failure to water the stock while in transit was the proximate cause of the loss. The record discloses no effort to discover such cause by an examination of the animals or otherwise. Under the special contract defendant was not liable if death resulted from smothering, or arose from the condition of the stock. When unloaded the hogs were "hot," 19 of them were dead, and the car was dry. That is all we know, all the jury knew. What caused the hogs to die? Smothering, some latent disease, or failure to "wet them down"? There was not a scintilla of evidence from which any fair-minded person could determine to which of these causes the loss should be ascribed. The burden was upon the plaintiffs to establish facts from which the jury might legitimately infer that failure to water the stock was the proximate cause of death. The evidence did not need to be direct and positive, but it should have been such as to justify reasonable men in finding that death resulted from the alleged cause. Mere probability was not enough. Facts and circumstances should have been shown sufficient to convince fair-minded men without resort to conjecture or uncertain and inconclusive inference. *Harrison v. Railway Co.*, 6 S. D. 100, 60 N. W. 405.

The judgment is reversed, and a new trial ordered.

ELLIOTT v. SOUTHERN PAC. CO.

(Supreme Court of California, Nov. 25, 1904. On Rehearing, D 1904.)

[79 Pac. Rep. 420.]

Ejection of Passenger—Acceptance of Ticket—Offer to Pay—Insufficiency of Evidence.—In an action against a railroad for wrongful ejection of a passenger, evidence held insufficient to support findings that the conductor received plaintiff's ticket as tling him to travel, or without notifying him that it was of no or that plaintiff intimated in any way that he would pay his or present a valid ticket if the ticket which was taken up should be returned.

Excursion Tickets—Extension of Time Limit—Reasonableness.—Where a railroad sold special excursion tickets limited to three days which expired on July 6th, and could not be used within the prescribed time, owing to a strike and interruption of train service, an extension of the time limit for six days from July 13th was a reasonable period of extension; nor was it rendered unreasonable as to a particular passenger, by reason of his having no occasion to use his ticket until August 13th.

Same—Time Limit.*—A railroad may limit the time within which a ticket sold at reduced rates may be used.

Same—Same—Delay Caused by Strike—Rights of Ticket Holder.—The fact that a railroad which sold limited return-trip tickets failed, owing to a strike, to carry the passengers on the return within the period prescribed by the ticket, and thereby put them to the trouble, inconvenience, and expense of returning by other means, while it might give rise to liability for damages proximately caused by its failure to perform its contract according to its terms, did not give the passengers the right to enforce a passage under the original contract, and on another journey taken by them within a reasonable time subsequent to the time specified in the contract.

Same—Same—Fraud—Rights of Ticket Holder.—Fraudulent concealment by a railroad company of the fact that it might not be able to carry a passenger on his return trip within the time prescribed in a ticket which is sold to him does not give the passenger a right to use the ticket at a time subsequent to that limited in the contract, and thereby make a new and different contract.

Same—Same—Same—Statute.—Under Civ. Code, § 1568, providing that consent to a contract is deemed to have been obtained through fraud only when it would not have been given, had fraud not existed, concealment by a railroad ticket agent of the fact that the railroad might not be able to return a passenger within the time limited by the ticket sold him is not such a fraud as to vitiate the contract where it is not shown that, if the passenger had known the fact concealed from him, he would not have purchased his ticket.

Same—Same—Waiver.†—A statement by a railroad employee, ten days after the sale of a ticket, that it would be good as soon as train

*As to the validity of stipulation fixing time for expiration of ticket, see extensive note appended to Walker v. Price (Kan.), 10 Am. & Eng. R. Cas., N. S., 432.

†As to the damages recoverable for refusal or failure to carry a passenger, see foot-note appended to Schmidt v. Cleveland, etc., R. Co. (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149.

‡As to the authority of employees to waive conditions on tickets, see note, 20 Am. & Eng. R. Cas., N. S., 440.

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began to run, was not a waiver of the time limit on the ticket, where the employee making the statement was not the one who sold the ticket, and he was not shown to have any authority to make the waiver.

Ejection of Passenger—Expiration of Ticket—Refusal to Pay Fare.—Under Civ. Code, §§ 487, 2188, providing that a passenger who refuses to pay his fare or exhibit or surrender his ticket when reasonably requested so to do may be ejected, a passenger who exhibited a limited ticket, which had expired and was void, and refused to pay his fare, was properly ejected, although the conductor wrongfully retained the void ticket presented by the passenger.

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Samuel W. Elliott against the Southern Pacific Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. A. Moore, for appellant.

George Lezinsky, for respondent.

ANGELLOTTI, J. Defendant appeals from a judgment rendered in favor of plaintiff for the sum of \$700, and from an order denying its motion for a new trial. The action was for damages alleged to have been suffered by plaintiff by reason of his alleged wrongful and forcible expulsion from a train of defendant on August 13, 1894, on which train, it was alleged, the plaintiff was a passenger. The case was tried without a jury.

The record shows the following facts: On August 13, 1894, the plaintiff boarded defendant's train at the Oakland Pier, Alameda county, for the purpose of being transported thereon to Pleasanton, in the same county. He presented to the conductor for his passage on such train a round-trip ticket, "From Pleasanton to San Fran. and return," which he had purchased from defendant's ticket agent at Pleasanton on July 3, 1894, at a reduced rate, to wit, one fare for the round trip, viz., \$1.10, and which he had used on July 3d in traveling from Pleasanton to San Francisco. This ticket was distinctly marked upon its face, "Void after July 6, 1894," and this limitation, and the fact that the ticket was sold at a reduced rate, were known to plaintiff at the time he purchased the ticket. The conductor at once handed the ticket back to plaintiff, informing him that it was no good; that it had expired. The plaintiff told the conductor that he thought he was entitled to ride on it; that he had bought and paid for it; and that it was no fault of his that he had not ridden on it. The conductor then left the plaintiff, but, returning presently, said, "Let me see that ticket," and, upon plaintiff handing it to him, said, "That is no good," and put it in his pocket. He further said, "You will either have to pay your fare or get off the train at San Leandro." Plaintiff said, "Then give me back my ticket." The conductor said, "Well, I will look out for that ticket." When near San Leandro, he returned and said, "Now you will have to get off here or pay your fare." The plaintiff said, "I don't propose to do

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either until you give me back my ticket." The conductor said, "I will take care of the ticket. You will have to get off the car." The plaintiff said, "I don't propose to do either." The conductor said, "I will put you off," and plaintiff said, "Bring your crowd." The foregoing statement as to what took place on the train is from plaintiff's testimony, and is as favorable to him as any of the evidence given. The plaintiff forcibly resisted all attempts to eject him, and was by means of force ejected by defendant's servants from the train, but no more force or violence was used than was reasonably necessary to effect the ejection. "Neither his [plaintiff's] bodily suffering nor his mental suffering were very great, nor were his bodily injuries serious."

The foregoing statement of facts is in accord with the findings of the court, except in so far as certain findings may be capable of being construed as showing that the conductor received the ticket as in any degree entitling plaintiff to travel, or without notifying plaintiff that it was of no value and that he could not honor it, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the other ticket should be returned. In so far as the findings may intimate any of these things, they are not supported by the evidence, as is fully shown by plaintiff's testimony on this subject, which has already been stated. The case in this respect is simply one where the conductor repudiated as absolutely void, and expressly refused to honor for passage, a ticket that was absolutely void, but, after so expressly refusing to honor it, nevertheless took it into his possession and retained it.

It was further found by the court substantially as follows: From July 5, 1894, to July 13, 1894, defendant, notwithstanding its desire and attempts to operate its passenger trains between Oakland Pier and Pleasanton, was absolutely prevented from doing so by the forcible violence of a large body of men; the trouble having been caused by a "strike" of "engine firemen in its employ." On July 5 and 6, 1894, it did not operate any of its ferryboats between San Francisco and Oakland Pier. It did, however, operate a ferryboat between San Francisco and a place in Oakland near a station on the railroad from Oakland Pier to Pleasanton. On both days, the plaintiff went to the proper place in San Francisco for the purpose of taking passage, and learned that defendant was not operating its boats or trains. He however, on July 6th took passage on the ferryboat running to Oakland, using his ticket for that purpose, and, having arrived at the landing place in Oakland, proceeded upon his journey to Pleasanton, where he arrived the same day, walking a part of the way, and riding the remainder of the way upon conveyances not operated by the defendant. Train service was resumed on July 13, 1894, and defendant, by its order to its conductors, extended the time within which plaintiff and others similarly situated might use tickets of like character for return passage about six days, which period elapsed in the month of July, 1894,

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but the fact of such extension was not communicated to plaintiff. The court further found that such period of extension was not a reasonable period; that the first opportunity that the plaintiff had of using said ticket for transportation between Oakland Pier and Pleasanton was on August 13, 1894; and that this was a reasonable time within which to use the same. These findings are attached as not being sustained by the evidence, and the attack is, in our opinion, well founded. Six days was twice the original life of the ticket, and certainly much more than sufficient to enable one who had come from Pleasanton to San Francisco upon such a ticket to make his return journey. August 13th was not the first opportunity that plaintiff had of using said ticket, for the train service had been resumed on July 13th, and continued uninterrupted thereafter. The only basis for a finding that August 13th was the date of plaintiff's first opportunity to use the ticket is the evidence of plaintiff that after July 6th he was not again in San Francisco or Oakland until August 13th; in other words, that he did not again have occasion to go from San Francisco or Oakland to Pleasanton until that time. This cannot, in a case of this character, be the criterion as to what was reasonable time or the first opportunity. The court further found that, at the time defendant sold the ticket to plaintiff, it knew, or had good and sufficient reason to know, from the facts and circumstances then existing and within its knowledge, that it would be or might be unable to transport plaintiff upon said railroad on July 5th or 6th; that it did not communicate these facts and circumstances to plaintiff; that plaintiff did not know thereof; and that, if he had known thereof, he would not have purchased the ticket. There is absolutely no evidence to sustain the finding embraced in the last clause. The court also found that, in selling the ticket under such circumstances, the defendant committed a fraud upon plaintiff. The plaintiff testified that on July 5th, when at San Francisco, he found that the trains were not being operated, he asked a man who was stationed at the ticket window of defendant to give him his money back. The man told him that his ticket was good until the next day, and, in response to plaintiff's inquiry as to what would happen if the trains were not then running, said: "It will be good when they do start." It further appears that on August 13th plaintiff, in San Francisco, purchased a ticket from San Francisco to Pleasanton, which, however, he never showed or offered to the conductor.

The foregoing statement presents all the facts necessary to a discussion of the legal questions involved.

There can be no question as to the right of a railroad company to limit the time within which a ticket sold at reduced rates may be used. As has been said, the passenger, by accepting and using such a ticket, makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for the contract. The passenger cannot take advantage of the reduction of the rate, and reject the terms on which alone the re-

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duction was made. See 1 Fetter's Carriers of Passengers, 289; 4 Elliott on Railroads, § 1598, and cases cited therein. The plaintiff's counsel, recognizing this now well-settled doctrine, argued on the trial that defendant had a right to limit the ticket under ordinary circumstances, the ticket in question would expire on July 6th, and that, if on July 5th and 6th defendant had been ready to carry the plaintiff, he would have had no claim under the ticket if he had failed to avail himself of the opportunity to be transported according to its terms. It is, however, contended that the inability and failure of the defendant to perform its contract of carriage within the time limited extended the time and gave to the plaintiff the right to demand performance at a reasonable subsequent time," and also that the limitation was void by reason of fraudulent concealment by defendant and circumstances which it knew or ought to have known at the time of the making of the contract, and which it failed to communicate to plaintiff, and that therefore plaintiff was entitled to use the ticket within a reasonable time, "the same as if no such limitation was set upon the ticket at all." We know of no principle of law or decision of any court that would warrant the application of these suggested rules to the circumstances of this case. The contract on part of the defendant railroad company was that it would, in consideration of the \$1.10 paid, not only carry the holder of the ticket from Pleasanton to San Francisco, but also carry him back from San Francisco to Pleasanton on any day not later than July 6th. Under its terms, the plaintiff was entitled to be transported by the railroad company whenever he presented himself for passage on July 6th, the last day of the validity of the ticket. The company failed to perform the obligation imposed on it by the contract, and it may well be that this failure on the part of the company constituted a breach of contract on its part, and that it became liable to the holder of the ticket for the damages proximately caused by such breach of contract. Defendant being unable to perform its contract, the holder of the ticket thereupon made his return trip to Pleasanton without the aid of the company and by other means. He thus completed his journey and measured his damages. Whatever damages were caused by the failure of the railroad company to carry him on or before that day had been accrued, and his cause of action against the company by reason of the breach of contract was then complete. It had failed to perform its contract to transport him from San Francisco to Pleasanton, and could not thereupon perform it according to its terms. The railroad company had never undertaken to carry him on any other journey than that for which the contract was expressly made, and no such liability could be imposed upon it in the face of its express contract to the contrary. The plaintiff could not, because of the failure of the railroad company to perform its contract, make a new contract for the company. This was not his remedy for the breach of contract. The law gave him a full and adequate remedy.

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way of action for damages for such breach, and this, under the circumstances of this case, was his sole and exclusive remedy.

In this connection, it would seem entirely immaterial whether or not there was any fraudulent concealment by the company at the time of the making of the contract of facts from which it might be inferred that it might not be able to fully perform the contract according to its terms. Such concealment could not operate to make a new contract between the parties. For it, if it existed, the law gave the plaintiff certain remedies, but the making of a new and different contract by him alone was not one of them. The record, however, does not show that plaintiff's consent to the contract was induced by any fraudulent concealment. The finding to that effect in response to the issue made by the pleadings finds no support whatever in the evidence. By express provision of our Civil Code, consent to a contract is deemed to have been obtained through fraud "only when it would not have been given had such cause not existed." Section 1568. See also, *Colton v. Stanford*, 82 Cal. 351, 399, 23 Pac. 16, 16 Am. St. Rep. 137. So the question as to the effect of fraud is entirely eliminated.

It has been frequently said, in effect, that a limitation as to the time within which the passage contracted for must be made must, in view of all the facts and circumstances existing at the time the contract is entered into, be reasonable, and that, if it be unreasonable, the passenger, availing himself of the first opportunity to complete his journey, may so complete it under the contract, although the time stipulated therein has expired. But the rule here suggested, we are satisfied, goes no further than above stated. Thus, in 2 Wood's Railway Law, 1403, the instances suggested to support the statement that conditions of this character must be reasonable or they will have no validity, and, if impossible of performance, they are unreasonable, are, first, that if a ticket is issued from A. to B. and return, "good for this day only," and there is no train which leaves B. on the return to A. after the arrival of the train, the condition would be unreasonable, and the holder would be entitled to a return passage to A. on the first train leaving B. for A. on the next day; and, second, if a ticket is issued from A. to B. "good for this day only," and by some accident to the train the trip is not completed until the next day, the ticket is good for the balance of the passage. Elliott says that the limitation must be reasonable, and in the note thereto that if the company runs no train on the day to which it is limited, or if it is a round-trip ticket, and there is not time to make the round trip within the period of limitation, or if it is a through ticket over connecting lines, and the time is too short to reach the last line, where there is no delay within such period, "we suppose the traveler could take the first train on the next day." 4 Elliott on Railroads, § 1598, and note. Fetter says that the time limited must allow sufficient time "for a person using ordinary diligence to accomplish the trip," and, quoting from Little Rock & F. S. Ry.

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v. Dean, 43 Ark. 529, 51 Am. Rep. 584—a case strongly relied by plaintiff—says: “The carrier must afford a purchaser of a limited ticket the necessary facilities for accomplishing his journey within the stipulated time, and upon his failure to do so, he is not in position to treat the contract of carriage as forfeited, and demand a repayment of fare for the same passage at least if the ticket holder avail himself of the first opportunity to *complete his journey* after the expiration of the time limit.” The italics are ours. The case cited was one where the passenger, having a through ticket over connecting lines, took the first train on defendant’s road that left the place after his arrival therein, on a train of the connecting road. Gulf, etc., R. Co. v. Wright (Tex. Civ. App.) 30 S. W. 294, cited by plaintiff, was a case where the stipulation on the ticket was that it should be entirely used within three days after being stamped for the return trip; and the passenger, traveling diligently, failed to finish his journey within that time owing to delays in the movements of trains on the part of the railroad company; and it was held that he could finish his journey. The only other case cited by plaintiff at all applicable upon this point is that of Auerbach v. N. Y. C. H. R. Co., 60 How. Prac. 382, where, in deciding for the railroad company, the court said, in effect, that where the agreement was that one must use his ticket for a continuous passage prior to a certain date, and begins his continuous journey in time to reach his destination in the usual course of travel, but is prevented by delays occurring upon the railroad from finishing his journey within the lifetime of the ticket, he may continue his journey to its destination. Although this was mere obiter—the court holding that the plaintiff was not entitled to recover for the reason that he did not commence his journey in time to reach his destination in the usual course of travel within the lifetime of the ticket—it is in line with the statements heretofore mentioned as made in text-books and the cases already cited. It may be noted that the judgment in this case was reversed by the New York Court of Appeals upon the theory that the passenger did commence his journey on defendant’s road in time, and that, having so commenced it, he was entitled, under his contract, to pursue it continuously to the end, notwithstanding that the time expired while he was still on the train, pursuing such journey; the case, in this respect, being similar in principle to Lundy v. C. P. R. Co., 101 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100. See Auerbach v. N. Y. C. H. R. Co., 89 N. Y. 281, 42 Am. Rep. 290. However, there is nothing in the Auerbach opinion in 60 How. Prac. 382, or in any of the other cases cited by plaintiff, or in the views of the text-writers, or in the cases cited in the text-books, as to unreasonable limitations as to time, that supports the position to which plaintiff is forced by the circumstances of this case, viz., that because the railroad company failed, through its own fault or inability, to transport him upon his return journey, and he was thereby subjected to the trouble and inconvenience and expense of returning with

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its aid and by other means, and he did so return, he may enforce a passage under the original contract upon another journey taken by him at a subsequent time, and after the expiration of the time specified in the contract, provided he does so within, as plaintiff says, "a reasonable time."

There is a plain distinction between the case where the passenger, seeking diligently to pursue his journey to its end, is prevented from so doing within the stipulated time by reason of the fact that the time allowed was too short to admit of the accomplishment of the trip, or by some fault or inability of the railroad company, and takes advantage of the first opportunity afforded by the company to complete such journey, and such a case as is here presented. In the former case the passenger is diligently proceeding under his original contract, availing himself of all the means offered by the railroad company to complete his journey, and the limitation as to time is ineffectual against him only to such an extent as is necessary to enable him to reach his journey's end. In this case the plaintiff was not proceeding under the original contract at all, but was simply seeking, by reason of defendant's breach of such contract, to enforce a passage upon a subsequent and distinct journey, commenced long after the expiration of the time stipulated in the contract. We know of no principle of law that would warrant him in so doing.

There is nothing in the suggestion that the statement of defendant's employee at the San Francisco ticket office on July 5th, in response to plaintiff's query as to what would happen if the trains were not running on July 6th, that "it will be good when they do start," operated as a waiver by the railroad company of the stipulation as to time. It will be observed that this is not a case of a statement made by an employee of the company at the time of the sale of the ticket and the making of the contract, but, if the statement was made at all (there is no finding of the court upon the subject), it was made two days after the contract was entered into, and by another employee, who was not shown to have any authority to make such a waiver, even if the language used could be construed as a waiver at all. The only case cited by plaintiff to sustain his contention on this point is that of *Nelson v. Long Island R. Co.*, 7 Hun, 142, where one of the three justices participating held that the statements of the ticket agent selling the ticket were admissible for the purpose of determining what the original contract was. Such cases are, of course, not in point.

It is further contended that the defendant could not, while retaining the void ticket offered by plaintiff, legally demand the delivery of any other ticket or the payment of fare, and could not legally eject plaintiff for failure to comply with such demand. As already stated in our discussion of the findings of the court on this subject, the conductor expressly repudiated this ticket as absolutely void, and notified the plaintiff that he could not honor it. It was, as a matter of fact, entirely without value.

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We are not at all satisfied that the conductor had any right to retain this ticket, but we cannot see how an improper retention of a worthless ticket by the conductor could give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare. He had not exhibited or surrendered a valid ticket, he had given nothing of value to the conductor, and he had refused and continued to refuse to pay his fare. The statute provides that if any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, he may be ejected at any usual stopping place or near any dwelling house. Civ. Code, §§ 487, 2188. The conditions under which he might lawfully be ejected had thus arisen, and the improper retention of the worthless ticket could not impair the right of the railroad company to prevent him from riding without payment of fare. Upon this question the case of *Rahilly v. St. Paul & Duluth R. Co.*, 66 Minn. 153, 68 N. W. 853, is directly in point. The court there said: "We are all agreed that, even if the conductor had no right to take up the ticket, this would not give the plaintiff any right to refuse to pay his fare until and unless the ticket was returned. Having no right to ride on the ticket, it was his duty to pay his fare or leave the train, and then pursue his remedy against the defendant for wrongfully withholding the ticket from him." Plaintiff cites the case of *Vankirk v. Pennsylvania R. Co.*, 76 Pa. 66, 18 Am. Rep. 404, which is somewhat in line with his contention on this point. The case, however, differs from this in the fact, apparently considered material by the Pennsylvania court, that the plaintiff there offered to pay his fare, provided the ticket already delivered was returned to him. The opinion there proceeded upon the theory that the conductor had no right to demand anything in addition to the accustomed fare, and, the plaintiff having offered to pay this upon the return of the ticket improperly retained, the conductor's refusal to return it was a demand for something more than the accustomed fare. In the case at bar the plaintiff did not offer to pay his fare in the event that the ticket was returned. He simply said, in effect, that he would neither pay his fare nor get off the train until the ticket was returned, and the evidence clearly shows that he intended to ride upon the worthless ticket or be ejected from the train. The case of *Bland v. Southern Pacific Co.*, 55 Cal. 570, 36 Am. Rep. 50, cited by plaintiff, is clearly not in point. There a passenger from San Jose for San Francisco, who had failed to purchase a ticket, gave to the conductor, when the train was about four miles out of San Jose, \$2, which was the regular ticket price to San Francisco. The conductor put this in his pocket, and then demanded 20 cents additional, the extra amount due for fare to San Francisco when a passenger failed to procure his ticket at the station. The passenger refused to pay this, and the conductor then and there stopped the train, and, although the plaintiff then offered to pay the twenty cents additional, ejected him, without first re-

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turning the money already paid. It was said by the court that the conductor certainly had no authority to eject the passenger and keep the money paid and received as fare, and that the stopping of the train and the actual motion of the plaintiff were parts of a single act by which the servants of the defendant asserted a right to do that which they were not authorized to do while retaining plaintiff's money. This was clearly right, but the distinction between this case and that is obvious.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: VAN DYKE, J.; SHAW, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case. I think the case of *Bland v. S. P. Co.*, 55 Cal. 570, 36 Am. Rep. 50, is very clearly in point. The circumstances were different, but the cases cannot be distinguished in principle. The ticket which the conductor took and retained was the property of the plaintiff and had a legal value. It was evidence of a broken contract; and on the principle of the *Bland Case* the conductor had no right to eject the plaintiff without first returning the ticket. This is said, of course, upon the assumption that the plaintiff's account of the transaction was true. It was contradicted by the conductor; but here we must accept the evidence, which supports the findings of the trial court.

ROBERTSON v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, Dec. 20, 1904.)

[37 So. Rep. 831.]

Passenger Directed to Wrong Car—Liability.—A passenger who bought a ticket to her destination, but left the proper car at an intermediate station, where she got on the wrong car, and was consequently left at that station, and exposed to inconveniences and hardships, could recover from the railroad, or not, according as to whether her action was or was not directed by railroad employees on the train on which she was riding.

Same—Same—Erroneous Instruction.—In an action against a railroad for damages sustained by a passenger by reason of having gotten onto the wrong car, the complaint alleged that defendant's "conductor or flagman" directed plaintiff to the wrong car. Plaintiff's evidence showed that both the conductor and flagman separately and at different times gave plaintiff the direction complained of. Defendant's flagman testified that he gave plaintiff no such direction, and had nothing to do therewith. The conductor was not examined, and hence plaintiff's testimony as to what he told her was uncontroverted. Held, that a charge that plaintiff could not recover unless defendant's "conductor and flagman" told plaintiff to get on the wrong car was erroneous and prejudicial.

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Same—Same—Willfulness—Malice—Damages.*—A passenger who sustains damages by reason of having been directed by the carrier's employees to take the wrong car is entitled to recover, whether or not the act of the employees was negligent, inadvertent, willful, knowing, or malicious; but willfulness, malice, or other aggravating circumstances may be shown, as bearing on the amount of recovery.

Same—Contributory Negligence.†—A passenger may rely on a direction of trainmen as to the proper car to be taken, and is not chargeable with contributory negligence for following that direction, although a mistake resulting therefrom might have been avoided by making other inquiries or taking other steps of that nature.

Witnesses—Bias—Evidence.—In an action by a passenger for damages resulting from having taken the wrong car in pursuance to a direction of the railroad's flagman, the fact that plaintiff was a witness in another case involving misconduct on the part of the flagman was competent, after the flagman had testified, to show his bias as a witness.

Passenger Directed to Wrong Car—Willfulness—Evidence.—In an action by a passenger for damages resulting from having taken the wrong car in pursuance to a direction of the railroad's flagman, the fact that plaintiff was a witness in another case involving misconduct on the part of the flagman was not competent as tending to show that he willfully directed her to the wrong car.

Appeal from Circuit Court, Bibb County; John Moore, Judge.

Action by Ella Robertson against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint, as originally filed, contained two counts, which alleged, in substance, that the plaintiff on January 23, 1902, purchased a ticket from Birmingham to Belle Ellen, on the line of defendant's road, and went on board of one of defendant's trains which ran between these points; that shortly before reaching Yolandy, a station about 30 miles from Birmingham, and from which point a spur track leaves the main line for Brookwood, the plaintiff was told by the conductor in charge of the train, or by the flagman, "that she was in the Brookwood coach, when she was in the Belle Ellen coach, and pointed out to the coach in front as the one for Belle Ellen, and told her to change cars at Yolandy, and to go into the front car." The complaint then alleged that in obedience to these instructions the plaintiff changed cars at Yolandy, going into the car pointed out to her, which car was at that point detached from the train, and left on a side track, to be taken by another train to Brookwood, and that the train, leaving this car, but taking the one in which plaintiff had previously ridden, went on to Belle Ellen, leaving plaintiff

*As to the liability of railroad companies for willful or malicious acts of their employees, see foot-note appended to *Alabama & V. R. Co. v. Livingston* (Miss.), 13 R. R. R. 464, 36 Am. & Eng. R. Cas., N. S., 464; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244.

†As to the duty of passengers to inform themselves as to the movements of trains, see note appended to *Gulf, C. & S. F. Ry. Co. v. Moorman* (Tex. Civ. App.), 11 Am. & Eng. R. Cas., N. S., 157.

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in ignorance of its departure, and without any means of reaching her destination; that there was no train by which she could reach her destination until the next day. The complaint then alleged that she was left at Yolandy about sundown in the evening, in extremely cold weather, and that there were no accommodations for travelers at Yolandy, and that she was compelled, at great expense, to get some one to go with her to the next station, a distance of five miles, to obtain a place where she could spend the night; that she was compelled to walk this distance, carrying her infant in her arms, in the cold, and was compelled to sleep in an open room, without fire, and in consequence she was sick for several weeks, and suffered greatly in mind and body, "all by reason of said willful or wanton order of the said conductor or flagman as aforesaid." The second count of the complaint is substantially the same, but concludes that the damages suffered by the plaintiff were "all consequent upon the said negligent act of the said conductor or flagman of the said train as aforesaid." The complaint was amended by the addition of two counts, containing substantially the same averments, but adding allegations of willfulness and wantonness.

Logan & Vandegraaff, for appellant.

Ellison & Thompson, for appellee.

MCCLELLAN, C. J. It was the defendant's duty, under the averments of the first and second counts of the complainant, to carry the plaintiff from Birmingham to Belle Ellen. The averments of those counts going to show that she was a passenger on defendant's train on its schedule run from the former to the latter place, and fully entitled, as such, to be carried to Belle Ellen, were proved without conflict—in fact, admitted—on the trial. The evidence is clear in support of the conclusion that this duty would have been performed, and that the plaintiff would have been carried to Belle Ellen, but for the fact that at Yolandy, an intermediate station, whence there was a branch railway to Brookwood, she went out of the car, in which up to that time she had been riding, bound for Belle Ellen, into a car which, though up to that time a part of the same train, was at that point to be detached and left on a siding, to be carried in another train to Brookwood. This car was then put on the side track, and left with her in it, while the train hauling the car from which she had moved went on to Belle Ellen. If she went into this Brookwood car of her own motion, and without fault on the part of the trainmen, in the mistaken belief that it, and not the car in which she had previously ridden, was to go on to Belle Ellen, and in consequence was left at Yolandy, the defendant is not liable for damages sustained by her in consequence of her not being carried to Belle Ellen. But if she made this change of cars, and as a consequence was left at Yolandy, and suffered injuries, at the instance of the conductor or flagman of the Belle Ellen train, the defendant was liable. The complaint alleges that either the

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conductor or the flagman told her that the car she came from Birmingham to Yolandy in was the Brookwood car, and that the next car ahead was the Belle Ellen car, and that either the conductor or the flagman thereupon directed her to take the car ahead to be carried to Belle Ellen, and that, acting upon this information, and in accordance with this direction, she went into the car ahead, and with it—it proving to be the Brookwood car—was left at Yolandy. If she proved that either the conductor or the flagman thus caused her to take the wrong car and to be left, she was entitled to recover. The evidence for the plaintiff tended to show that both the conductor and the flagman separately and at different times gave her this information and direction. On behalf of the defendant, the flagman was examined as a witness to the effect that he gave plaintiff no such information or direction, nor had anything to do with plaintiff's changing cars. The conductor was not examined, being dead. On this state of pleading and proof, it was manifest error for the court to charge the jury that "unless they are reasonably satisfied that the conductor and flagman told plaintiff to get in the wrong car, and thus was left, then you must return a verdict for defendant." Nor can it by any means be said that the charge was without injury to the plaintiff, especially in view of the fact that plaintiff's evidence as to what the conductor did was not controverted, while as to the flagman it was directly contradicted. The jury, but for this instruction might well have found for plaintiff on the conduct of the conductor, while not believing her evidence as to the conduct of the flagman.

The case was unnecessarily cumbered up with additional counts and special pleas. The gravamen of the action is defendant's wrong in leaving plaintiff at Yolandy instead of carrying her to Belle Ellen. So far as the right of recovery is concerned, it is immaterial whether the alleged wrongful act of the conductor or the flagman was negligently, inadvertently, or mistakingly, willfully, knowingly, or even maliciously done; and it was not necessary for the complaint to employ any of those adverbs in characterizing the wrong. As bearing on the amount of recovery in such cases, it is competent—certainly where such is the averment—to prove that the wrongdoer acted willfully or maliciously, or with circumstances of aggravation. And the defense in such case is simply a denial of the alleged wrong—the general issue. There is no place in such case for pleas of contributory negligence. If defendant's wrong had any causal connection with the result complained of, it is of no consequence that plaintiff might have yet avoided the result by making other inquiry as to the proper car for her to take, or anything of that sort. She had a right to rely implicitly on what the trainmen told her in this connection, and to act accordingly. As the case was developed on the evidence, the sole inquiry was whether she took the wrong car at the direction of the conductor or flagman, or of her own motion, in the mistaken belief—not induced by any fault of the trainmen—that it was the right car.

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We discover no error in the rulings of the court on the admissibility of evidence. If, after the flagman had been examined as a witness, it had been proposed to show that the plaintiff was a witness in another case, to prove misconduct on his part as a flagman, that fact in that connection would have been competent as tending to show his bias as a witness in this case; but we are not of opinion that the fact of plaintiff being such witness in another case, involving a charge of wrong against the conductor and the flagman, was competent here to prove that they willfully or maliciously caused her to be marooned at Yolandy.

What we have said will suffice for the court's guidance on another trial, and we deem it unnecessary to discuss the rulings below on this trial in detail.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

NEVIUS v. CHICAGO, ST. P. & M. RY. CO.

(Supreme Court of Wisconsin, Feb. 21, 1905.)

[102 N. W. Rep. 489.]

Carriers—Limiting Liability.*—A railroad cannot by contract with a shipper relieve itself of liability for negligence in supplying unsuitable cars.

Injury to Live Stock—Defective Car—Shipper's Knowledge of Defect.—In an action against a railroad for damages to stock from the use of a defective car, evidence held to justify submission to the jury of the question whether plaintiff's agent knew of the defect at the time he loaded the stock.

Appeal from Circuit Court, Ashland County; John K. Parish, Judge.

Action by E. G. Nevius against the Chicago, St. Paul & Minneapolis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for injury, necessitating the killing of plaintiff's horse, resulting from a defective condition of the freight car in which such horse was shipped. The shipping receipt contained stipulation that: "The said shipper hereby accepts for transportation and acknowledges and admits the cars furnished by the Railroad Company to be sufficient and suitable cars in every respect for the shipment of said stock. * * * The car wherein the said stock is to be carried having been tendered to said shipper by the said Railroad Company for that purpose, the said shipper

*See foot-note appended to *Ragsdale, Harper & Weathers v. Southern Ry. Co. (Ga.)*, 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120; foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

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hereby agrees that such car * * * fit and proper for the purposes of such transportation." At the close of the evidence defendant moved for a direction of verdict, which was denied, and upon a verdict in favor of the plaintiff judgment was entered, from which defendant brings this appeal.

Tompkins, Tompkins & Garvin, for appellant.

E. C. Alvord and *H. E. Edwards*, for respondent.

DODGE, J. The only error assigned is the refusal to direct a verdict for defendant. That is supported by contention that the defect in the car was so open and obvious that plaintiff's agent who loaded the horses must be conclusively presumed to have known of it, and, so knowing, was guilty of such contributory negligence as to preclude recovery; also that, because of such knowledge, plaintiff was bound by the stipulation in the shipping receipt accepting the car and assuming any risks from its condition. The inefficacy of such stipulation to relieve a carrier in case of negligence in supplying unsuitable cars is well established by our decisions. *Abrams v. Ry. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; *Loeser v. Ry. Co.*, 94 Wis. 571, 69 N. W. 372; *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817. We need not discuss it. It suffices for the present case to say that we cannot agree with appellant's contention that plaintiff's agent must be presumed to have known of the defect in the car. That consisted of an old break of longitudinal boards such as to leave a hole near the car door about three feet long and six to seven inches wide. The agent testified he had no opportunity to inspect the car, as he had to load the horses in a hurry while the train was waiting, and that he had no knowledge of such or any defect. It does not appear whether the pieces of boards whose absence caused the hole were wholly displaced at the time of loading, nor that the horses were loaded on that side of the car, nor that the car was so situated that the side opposite from the loading chute was accessible for inspection. With such facts it surely is not beyond reason to credit the agent's denial of knowledge, or to hold such ignorance consistent with ordinary care. Hence those questions were properly for the jury. Since they have been resolved in favor of plaintiff, we need not consider whether a different finding would have constituted a defense.

Judgment affirmed.

LEXINGTON RY. CO. *v.* O'BRIEN.

(Court of Appeals of Kentucky, Feb. 21, 1905.)

[84 S. W. Rep. 1170.]

Ejection of Passenger—Payment of Fare—Pleading—New Cause of Action.—Where, in an action against a street car company for ejectment from a car with unnecessary force, the petition alleged that plaintiff had paid his fare and was a passenger, an amendment alleging that plaintiff tendered in payment of his fare a transfer slip which he believed he was entitled to use, but which the conductor refused, and that thereafter he was ejected from the car, did not set up a new cause of action.

Same—Punitive Damages.*—In an action against a street railway company for ejectment from a car with unnecessary force, an instruction that if defendant's agent was inspired to use excessive force by actual malice or ill will the jury might allow punitive damages was too favorable to defendant, as plaintiff was also entitled to punitive damages if he was recklessly or wantonly thrown from the car.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by John O'Brien against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. C. Stoll and Morton, Webb & Wilson, for appellant.
Allen & Duncan, for appellee.

NUNN, J. Appellant prosecutes this appeal from a judgment of the Fayette circuit court rendered against it for \$2,000 in favor of appellee for personal injuries sustained by him as the result of being thrown from one of appellant's street cars by the conductor thereof. The appellee received his injuries on the 6th of November, 1899. He alleged, in substance, in his petition, that he had paid his fare, and was a passenger on the car, and that appellant's agents and servants in charge thereof unlawfully, willfully, maliciously, and wantonly assaulted the appellee, and pushed and threw him from the car to the street below; that by reason of this wrongful act he fell upon the street, and received severe injuries (describing them). The appellant filed an answer traversing the allegations of the petition, and in the second paragraph thereof alleged that appellee got on the car, and the conductor asked him for his fare, when he produced a blue transfer ticket, of the form issued by the appellant company for its own convenience and that of its passengers, to be used within a definite time as shown by the punch mark on the margin of it, and to be used only by persons getting on appellant's cars at its transfer station located on Main street at the intersection of Cheapside. The ticket had printed upon it the following stip-

**McNamara v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 832, 35 Am. Eng. R. Cas., N. S., 832; *Chiles v. Southern Ry. (S. Car.)*, 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750.

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ulations and agreements, which were accepted and assented to by all persons receiving the ticket, viz.: "Not good on route or after time punched; nor unless presented by the person to whom issued on first car passing transfer station for desired route, and will not be honored unless holder boards car at transfer station." That appellee was informed that this ticket was not good because he did not get on at the transfer station. He refused to pay his fare, and appellant's conductor ejected him from the car, using no more force than was necessary in so doing. Appellee traversed these allegations by a reply. In the month of November, 1901—more than 12 months after he had received his injuries—he filed an amended petition as follows: "The plaintiff, John O'Brien, says that on the 8th day of November, 1899, he boarded an East Main street car by mistake, thinking it was a Dewees street car; that he paid his fare, and, when reaching Dewees street, found his mistake; that the conductor on the Main street car gave him a transfer slip properly punched, and directed him to transfer to the Dewees street car; that the plaintiff, believing that he had the right to use this transfer slip in payment of his fare on the Dewees street car, boarded same, and presented the slip to the conductor, who refused to accept it, and demanded an additional fare; that upon plaintiff's declining to pay same the conductor undertook to and did eject plaintiff from the car, and in doing so used far more force than was necessary, and pushed the plaintiff violently off of the car upon the ground, by reason of which he received the injuries complained of in his original petition." Appellant traversed these allegations, and by a separate answer to the amended petition pleaded the statutes of limitations of one year as a bar. The appellant contends that by this amended petition appellee abandoned his original cause of action and set up a different and distinct cause of action other than that alleged in the original petition. The court sustained a demurrer to appellant's answer pleading the statutes of limitations, and this is the first alleged error complained of.

We are of the opinion that the court did not err in this. The appellee's cause of action was for the injuries received by him at the hands of appellant's servants in charge of the car. The object of the amendment was for the purpose of correcting a mistake made in the original petition with reference to facts leading up to the time when he received his injuries. See *Smith v. Bogenschultz*, 19 S. W. 667, 20 S. W. 390, 14 Ky. Law Rep. 305. There were three trials of the case in the lower court. On the first one the jury failed to agree. On the second, appellee recovered a verdict for \$5,000, which was set aside on motion of appellant. The last trial resulted as above stated.

It appears from the evidence that the appellee in good faith believed that this transfer ticket entitled him to ride upon this car. When he presented it, the conductor, without examining it, tore it to pieces, and threw it upon the floor of the car, and demanded of appellee his fare. Appellee claimed that he had a

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right to ride upon this transfer ticket, and undertook to explain to him what he had a right to ride upon this transfer ticket had said. The conductor told him that the ticket was not good, and that he would have to pay his fare or he would put him off. Appellee told him that he could not put him off. The conductor stopped the car, grabbed appellee by the lapel of his coat, jerked him around so that his back was toward the steps of the car, and suddenly gave him a shove in the breast, which threw him off, and he fell on the macadam street, and was severely and seriously injured. There is no conflict in the evidence as to the extent of appellee's injuries; but appellant claims that his crippled condition is partly due to an injury he sustained about the year 1883, and complains because the court failed to give an instruction upon this hypothesis, and cites the case of *L. & N. R. R. v. Kingman*, 35 S. W. 264, 18 Ky. Law Rep. 82. In that case the verdict was for \$12,000, and the court had instructed the jury, in effect, to disregard the evidence as to Kingman's physical condition caused by the injury received four years prior to the negligence complained of. The court in the case at bar, in its instructions, confined the jury to giving appellee compensation for any injury done to him by any excessive force used by defendant's agent in ejecting appellee from appellant's car, if in fact such excessive force was used. The court, in giving its instructions, acted upon the idea that appellee's right of recovery, if any he had, was based solely upon the excessive force used by appellant's conductor in ejecting him from the car, and said, in effect, that, if he used more force than reasonably appeared to him to be necessary to accomplish that purpose, then they should find for the appellee; otherwise they should find for the appellant. Appellant does not complain of the court's action in this, but does complain of the instruction authorizing punitive damages. The court, in submitting the question of punitive damages, used this language: "And if the jury further believe from the evidence that said agent was inspired to use such excessive force, if he did so, by actual malice or ill will towards the plaintiff, the jury may, in their discretion, allow punitive damages," etc. This instruction was more favorable to appellant than it was entitled to. The court should have added after the word "plaintiff" the words "or wantonly or recklessly threw him from the car." Without referring to the evidence on this subject in detail, we are of the opinion it authorized the court to submit this question to the jury.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

BOULFROIS *et al.* v. UNITED TRACTION CO.

(Supreme Court of Pennsylvania, Dec. 31, 1904.)

[59 Atl. Rep. 1007.]

Injury to Passenger—Contributory Negligence.*—It is negligence per se to attempt to get on and off a moving car, whether propelled by steam or electricity.

Same—Same—Sudden Jerk While Passenger Was Boarding.—Where plaintiff attempted to get on a moving electric car, and was safely on when he was thrown off by the act of the motorman in suddenly starting the car with a jerk, the company is liable, though the original act of plaintiff was negligent; but if the sudden jerk happens while plaintiff is getting on the car, and before he has reached a place of safety, the company is not liable.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Action by Armand Boulfrois, Sr., and Armand Boulfrois, Jr., by his next friend, against the United Traction Company. Judgment for plaintiffs, and defendant appeals. Reversed.

At the trial it appeared that Armand Boulfrois, Jr., was injured while in the act of getting on a moving electric summer car. Plaintiff claimed that he had actually reached the running board of the car, when he was immediately thrown therefrom by a sudden jerk of the car, and his foot was injured, and subsequently amputated.

The defendant presented these points:

“(1) That under the pleadings in this case the plaintiffs are not entitled to recover. Answer. Refused.

“(2) That under the evidence in this case the plaintiffs are not entitled to recover. Answer. Refused.

“(3) The evidence showing that Armand Boulfrois, Jr., being upwards of fourteen years of age, attempted to board a street car while in motion, he is prima facie guilty of contributory negligence, and the burden of proof is upon him to establish by the weight of the evidence that he successfully boarded the car; and if the jury find from all the evidence in the case that the said Armand Boulfrois, Jr., sustained injuries in the attempt to board the car while in motion, by reason of the motion of the car, the verdict of the jury should be in favor of the defendant. Answer. Affirmed, with a qualification.

*As to whether it is contributory negligence to board a moving car, see foot-notes appended to *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295; *Southern Ry. Co. in Miss. v. Williams* (Miss.), 12 R. R. R. 90, 35 Am. & Eng. R. Cas., N. S., 90 (street cars).

As to whether it is contributory negligence to alight from a moving car, see foot-note appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; foot-notes appended to *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; foot-note appended to *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

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"This point is affirmed, unless you find, as I have stated, that the motion of the car was such as to induce plaintiff to believe that it was about to stop, or at least the motion was such that he or any reasonable person would be induced to believe that he could get on with safety. Now, he alleges not only that the motion had been so reduced, not only that it was sufficient to induce him to believe that he could get on in safety, but that he actually did get on in safety, and would have reached his seat in the car but for the sudden and violent jerk with which it was started, or with which its speed was increased, and that jerk, followed by a second one, threw him off. That is the contention of the plaintiff, and that is, as I have stated, the negligence of which he complains; and, if you find that to be the case, he is entitled to recover. But if he merely, without signaling the car to stop, and while it was in motion, attempted to board it, and the accident occurred through that action on his part, he is not entitled to recover. But ordinarily the rule of law is that, where a person attempts to board a car in motion, he is guilty of negligence in so doing. As it has been explained to you, if that motion had come down to such a slow rate of speed that he was reasonably induced to believe it would either stop, or that it was at such a rate of speed that he could board it with entire safety, and, as he states himself in this case, he did board it in safety, and the accident resulted from the violent starting of the car, then the company is liable."

The court charged, in part, as follows: "It was the duty of the motorman in charge of the car not only to slow up, but to actually stop, if the passenger had signaled him to do so. It was his duty to stop and give the boy time sufficient to enable him to board the car in safety and take his seat. If the motorman did not do so, then he was guilty of negligence, and the company is liable for this accident."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

William A. Challener, Clarence Burleigh, and James C. Gray, for appellant.

R. A. Balph and James Balph, for appellee.

DEAN, J. We desire it to be distinctly understood that in *Powelson v. United Traction Co.*, 204 Pa. 474, 54 Atl. 282, *Hunterson v. Traction Co.*, 205 Pa. 568, 55 Atl. 543, and *Bainbridge v. Traction Co.*, 206 Pa. 71, 55 Atl. 836, we had no intention of relaxing the well-established rule "that to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it." To this rule, as in all rules, we further said there are some rare exceptions, as in *Johnson v. West Chester, etc., Railroad Co.*, 70 Pa. 357, and *Pennsylvania Railroad Co. v. Peters*, 116 Pa. 206, 9 Atl. 317, and a very few others, which, because of their peculiar facts, are exceptional. From the whole evidence in this case, it did not

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necessarily and certainly follow that Armand Boulfrois, Jr., the injured person, was either negligent or not negligent. If the car had not stopped when he attempted to get on, and by that attempt he was injured, he was negligent, and cannot recover. If it either had or had not stopped, and he was safely on, then, if the conductor, by suddenly and recklessly turning on the power, gave the car a jerk which threw the boy off, it was the conductor's negligence that caused the injury, and he can recover. If the boy's attempt to get on was not complete—if he was still engaged in the attempt—when the car was jerked, the inceptual act of negligence when he stepped from the ground onto a moving car still continued, and he cannot recover. If he was negligent in getting on, as from his own testimony he was, then, when safely on, before he had time to get seated, the conductor by suddenly turning on the power jerked him off, it was the conductor's negligence which caused the injury, and defendant is answerable.

Was the act of getting on complete when the jerk threw him off, if it did throw him off? If it was complete, then the company's negligence caused the accident, just as clearly as if some other passenger, on his feet, looking for a seat, was thrown violently to the floor, or thrown off by a sudden jerk of the car by a reckless conductor. The boy's good luck in reaching the running board in safety did not condone the negligent act of getting on, if he was not yet safely on when thrown off. We have tried to make our meaning plain. If we have failed it is either because our obtuseness of perception or poverty of language fails to make plain to others what is plain to us. The learned counsel for appellee seems to have misapprehended our ruling in the Powelson and other cases cited, for in his argument he uses this language: "We still understand this court to adhere to the well-established rule that whenever the standard of duty shifts, not according to any fixed rule, but with the facts and circumstances developed at the trial, the question of negligence cannot be determined by the court, but must be submitted to the jury." That is not the law applicable to this evidence. As applicable to the facts here, the law is correctly embodied in defendant's third written prayer for instruction at the trial, as follows: "Third. The evidence showing that Armand Boulfrois, Jr., being upwards of fourteen years of age, attempted to board a street car while in motion, he is prima facie guilty of contributory negligence, and the burden of proof is upon him to establish by the weight of the evidence that he successfully boarded the car; and if the jury find from all the evidence in the case that the said Armand Boulfrois, Jr., sustained injuries in the attempt to board the car while in motion, by reason of the motion of the car, the verdict of the jury should be in favor of defendant. Answer. Affirmed, with a qualification." The substance of the qualification appears in the general charge thus: "This point is affirmed unless you find, as I have stated, that the motion of the

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car was such as to induce the plaintiff to believe that it was about to stop, or at least the motion was such that he or any reasonable person would be induced to believe that he could get on with safety." The court then went on and elaborated further this qualification, but in no manner detracted from its significance as we have quoted it. It was, in substance, a denial of the point, and, in effect, adopting as the law the argument of appellees' counsel already quoted, that the standard of duty, as to one who gets on or off a moving car, shifts not according to any fixed rule, but with the facts and circumstances. To this we say that as to one who gets on or off a moving car, and is injured by so doing, the standard does not shift; he is negligent per se. But if he escaped injury by that act of his own, yet subsequently, no matter how short the time, from his own first act, by the distinct act of negligence on the part of the conductor, he was injured, he can recover. The evidence showed without question that plaintiff attempted to get on a moving car. Can it be reasonably said, in view of all the testimony, that he was safely on when he was jerked off by the act of the conductor?

It was error to affirm, with a qualification which neutralized it, appellant's third point. This is the only error requiring notice.

The judgment is reversed, and a venire facias de novo is awarded.

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(Supreme Court of Indiana, Feb. 3, 1905.)

[73 N. E. Rep. 101.]

Carriers by Express—Requiring Delivery of Parcels—Application of Statute—Variance between Pleading and Proof.—Burns' Ann. St. 1901, § 3312a, providing that "all express companies" shall deliver express matter to persons to whom the same is directed, living within the corporate limits of cities having a population of 2,500, applies to all concerns carrying parcels by express, and there is no variance in alleging a carrier to be a corporation, though the proofs show it to be a copartnership.

Same—Same—Compliance with Statute.—Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver express matter to persons "to whom the same is directed, living within" the limits of cities having a specified population, is not complied with by a personal delivery to the consignee at the local office.

Same—Same—Validity of Statute—Interstate Commerce.*—As it is the general duty of a carrier by express to deliver parcels received by it to the consignee at his residence or place of business, Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver express matter "to persons to whom the same is directed" within the limits of cities having a specified population, merely requires the carrier, under compulsion of a penalty, to observe its general duty, and is not invalid as an attempt to regulate interstate commerce.

Same—Legislative Control.—Though a carrier by express is not organized as a corporation, it is subject to legislative control.

*For authorities in this series on the subject of state regulation of interstate commerce, see foot-note appended to *Kavanaugh & Co. v. Southern Ry. Co.* (Ga.), 12 R. R. R. 424, 35 Am. & Eng. R. Cas., N. S., 424.

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Same—Requiring Delivery of Parcels—Constitutionality of Statute—Due Process of Law.—Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver parcels to the consignees in cities having a specified population, is not a deprivation of liberty or property without due process of law, within the inhibition of Const. U. S. Amend. 14.

Appeal from Circuit Court, Howard County; J. F. Elliott, Judge.

Action by the state of Indiana against the United States Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker & Daniels and *Blacklidge, Shirley & Wolf*, for appellant.

W. C. Geake, C. C. Hadley, C. W. Miller, Ed. Daniels, L. G. Rothschild, and *Thos. S. Gerhart*, for the State.

GILLET, J. This action was commenced before a justice of the peace. Appellant was charged with a violation of the act of March 6, 1901 (Acts 1901, p. 97; section 3312a, Burns' Ann. St. 1901). The act (omitting the enacting clause) is as follows: "That all express companies doing business within the State of Indiana shall deliver all express matter to all persons to whom the same is directed, living within the corporation limits of cities within the State having a population of twenty-five hundred or more inhabitants, according to the last preceding United States census, and any express company failing to deliver such express matter shall be fined in a sum not to exceed one hundred dollars, or less than ten dollars, for each and every offense." It appears from the evidence upon the trial in the circuit court that on or about July 24, 1902, appellant was engaged in the express business, and that it had an office in the city of Kokomo. On that day the prosecuting witness, Thomas A. Gerhart, who lived in said city, received through the mail a postal card from said company, stating that it had at its office an express package for him, consisting of a box of fruit, and requesting him to call for it. The postal was addressed to Mr. Gerhart at his residence, No. 395 South Main street, in said city. Mr. Gerhart called up the agent on the telephone, and informed him that he desired to have the package delivered at his said residence. This the agent refused to do. There was a second refusal on his part in a conversation between the two at the express office in the course of which the agent stated that the express companies doing business in that city had limited their delivery limits some two weeks before. The package was addressed to Mr. Gerhart at his residence. Appellant introduced in evidence its articles of association, from which it appears that by articles of agreement certain individuals agreed that said company be organized as a joint-stock company for the period of 10 years from April 22, 1854, for the purpose of doing a general express forwarding agency, commission, banking, exchange, and insurance business. A capital stock of 5,000

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shares, of the par value of \$100 each, was provided for, and a board of directors was created, to whom the articles purported to grant extraordinary powers relative to the management of the affairs of the company. It was further provided in the agreement that all deeds of real estate and all bonds, mortgages, and other sealed instruments made to and for the benefit of the company should be made to and by the president of the company, and that he might bring and prosecute all suits in law and in equity. It was also stipulated by the writing that the death or disability of a stockholder should not dissolve or effect the business of the company, and it was provided that in case of the decease of any member and his shares of stock coming into the hands of any person who was not legally competent to act the company might purchase such shares at a value to be fixed by appraisement. By a supplemental agreement, made in 1859, the stockholders agreed that the existence of said company should be extended for 20 years from and after the 1st day of May, 1864, and that the board of directors might thereafter from time to time make extensions of the existence of said company as it might deem best, and it is shown by a resolution dated at New York, January 23, 1884, that the director purporting to act "pursuant to a legal notice," ordered a further extension for a like period. It also appears that the company had complied with the provisions in section 3307, Burns' Ann. St. 1901, relative to the filing of a statement in Howard county. Appellant assigns error in this court as follows: "(1) The facts stated in the affidavit upon which this prosecution was based do not constitute a public offense. (2) The facts stated in the affidavit and warrant issued thereon do not constitute a public offense. (3) The Howard circuit court erred in overruling appellant's motion for a new trial."

It is first contended by appellant's counsel that the charge in the affidavit that "the United States Express Company, late of said county, did then and there, being an express company, doing business within the state of Indiana," etc., amounts to an averment that appellant is a corporation, and that the evidence shows that appellant is a partnership. Assuming that, in the absence of proof of the law under which appellant claims to possess the extraordinary powers provided for in its articles, it is not shown that appellant was a corporation, it does not follow that there is any variance between the allegation and the proof. The legislation of this state shows that since 1855 the General Assembly has not only assumed to regulate, but has been familiar with the manner of the organization of, that class of carriers which furnish express facilities as auxiliary to the public service furnished by corporations operating over rail and water ways. Acts 1855, p. 99, c. 48; Acts 1879, p. 146, c. 56; section 3306, Burns' Ann. St. 1901; Acts 1883, p. 107, c. 88; section 3309, Burns' Ann. St. 1901; Acts 1901, p. 149, c. 93; section 3312b, Burns' Ann. St. 1901. The acts cited describe the organizations regulated at all copartnerships, associations of persons, joint-stock associations or com-

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panies, and sometimes the word "corporation" is also used. In all of these acts there is the added description, "usually called express companies." In the light of the legislation referred to, it is clear that when the act under review was adopted the words "all express companies doing business within the state of Indiana" had a settled meaning, and that they were employed in a generic sense. Indeed, any interpretation of the act which so limited its operation as not to include all of these auxiliary organizations which use the railroads and waterways of the state as a means of transporting parcels by express would render the act unconstitutional—an interpretation which this court will only adopt as a dernier ressort. There is no reason whatever for this interpretation, and we must conclude that the term "express companies" was employed generically.

Counsel have called our attention to certain early holdings of this court to the effect that, where an organization is described as a company, it will be presumed that it was intended to aver that it was a corporation. There is no occasion to call these rulings in question. Here we have a statute which uses the words "express companies" as descriptive of a class, and it is evident that the state is proceeding against appellant under this enactment. The words of the affidavit, "being an express company doing business within the state of Indiana," are set out by way of inducement. "Matter of inducement need not be set out in the indictment either so much in detail or with such directness of charge as those parts are required to be which constitute the gist of the offense." 1 Bish. Cr. Pro. § 554; Clark's Cr. Pro. p. 176. We do not perceive how it can be contended with any show of reason, considering the nature of the matter, that the state may not aver in the language of the statute that the defendant belonged to the class against whom the penalty is denounced. The inducement describes appellant as an express company, and the proof shows that it belonged to that class of organizations which the statutes describes as companies. As stated by an authoritative writer: "On the general principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense is to be tried for really is." Wharton, Cr. Pl. & Pr. § 220. This is a matter of settled law in this state. *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190, and cases there cited. It is competent for the legislature to provide that a partnership committing a certain act shall be liable criminally. No question of service is presented in this case by the assignment of error, and appellant appeared below by counsel.

It is next claimed by counsel for appellant, as we understand them, that the statute does not require a delivery at the residence or place of business of the consignee, but is satisfied with a personal delivery, from which we infer that appellant's position

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is that the statute may be complied with by holding the package at the local office subject to the call of the consignee. We recognize that criminal statutes are to receive a strict construction, and that courts are not at liberty to explore without the letter of the enactment for the intent of the legislature, but it is nevertheless true that the purpose of the lawmaking power may be ascertained from a consideration of the enactment as a whole, and that it is not to be construed so strictly as to defeat the obvious intent. *State v. Holgreiver*, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; *Lewis' Suth. St. Const.* § 528. The provision which limits the operation of the statute to cases where the consignee lives within the corporate limits would be meaningless if it were not the purpose of the legislature to require the carrier to do something more than to deliver the package at its own office. In this instance the address upon the package indicated that it was to be delivered to the residence of the consignee, and in such a case the duty of the carrier is plain.

It is argued that the act is so general as to amount to an attempt to regulate interstate commerce, and that therefore the enactment is void as a whole. As a proper preliminary to a discussion of the principal proposition thus asserted, we shall consider the duty of a carrier by express in the absence of any statute. Laying aside all question as to the delivery of goods by express at small stations, and also the question of usage as affecting the carrier's obligation, neither of which are elements in the case before us, it may be said that it is the duty of a carrier by express to deliver packages received by him to the consignee at his residence or place of business. *American Express Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *American Union Express Co. v. Robinson*, 72 Pa. 274; *Southern Express Co. v. Holland*, 109 Ala. 362, 19 South. 66; *Baldwin v. American Express Co.*, 23 Ill. 197, 74 Am. Dec. 190; *Gulliver v. Adams Express Co.*, 38 Ill. 503; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185, 83 Am. Dec. 89; *Alsop v. Southern Express Co.*, 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271; *Bennett v. Northern Pac. Express Co.*, 12 Or. 49, 6 Pac. 160; note to *Bullard v. American Express Co.*, 61 Am. St. Rep. 360; *Hutchinson on Carriers*, § 379. In discussing this subject Judge Redfield says: "In turning our attention more especially to the responsibility of express carriers, the first consideration distinctive of this mode of transportation is that they are bound to deliver parcels to the persons to whom they are addressed. This was the general rule as to carriers by land until since the introduction of railways. *Hyde v. Trent and Mersey Nav. Co.*, 5 T. R. 389. *Stephenson v. Hart*, 4 Bing. 476. *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68. Since the introduction of railways, carriers in that mode have been exempted from personal delivery of their parcels, and allowed to deposit them in warehouses, and thus exonerate themselves from the longer continuance of the responsibility of car-

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riers. *Thomas v. Boston & Prov. Railroad Co.*, 10 Metc. 472, 43 Am. Dec. 444. But the great necessity of having express carriers arose from this defect in delivering goods by the ordinary railway transportation, and the same defect also existed in regard to delivery of goods transported by steamboats. They could only deliver at the wharves, and were not expected to employ special messengers and porters to deliver their goods. *Chickering v. Fowler*, 4 Pick. 371. But it was to remedy this inconvenience, and restore the carrying business by land to its former state, in some degree, that express companies have come into use, with the distinctive character of making personal delivery of their parcels to the consignee. *Redfield on Railways*, § 127. This has been so often decided that it is scarcely required that any considerable number of cases should be cited. This question is considerably examined, and the view stated fully confirmed, in the case of *Baldwin v. The American Express Company*, 23 Ill. 197, 74 Am. Dec. 190, affirmed *American Exp. Co. v. Baldwin*, 26 Ill. 504, 79 Am. Dec. 389; 5 Am. Law Reg. (N. S.) 7.

Having ascertained that the purpose of the statute is merely to require the carrier, under the compulsion of a penalty, to observe its general duty, the question confronts us as to whether the enactment is such an attempted interference with interstate commerce as to make the act void. The decisions of the Supreme Court of the United States support the proposition that, in the absence of legislation by Congress, the state may enact reasonable laws under the police power, which are local in their operation, although they may incidentally affect interstate commerce. *Covington, etc., Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. "The matters upon which the silence of Congress is equivalent to affirmative legislation are national in their character, and such as to fairly require uniformity of regulation upon the subject-matter involved affecting all the states alike." *Western Union v. James*, *supra*; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. In *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, the facts were that the plaintiff was injured in Iowa while traveling in one of the cars of the company to Chicago upon a ticket which purported to limit the liability of the carrier. The case involved the validity of a statute holding such carriers to their obligations under the general law. The court said: "Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as

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those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precaution foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them, by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods.” In *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, it was held that a statute of the state of Georgia requiring telegraph companies, under penalty, to receive dispatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, was a valid exercise of the power of the state as applied to messages by telegraph from points outside of and directed to points within the state. In addressing itself to a consideration of the statute, the court said: “Is it a mere police regulation, that but incidently effects commerce such as *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, and which, at any rate, would be valid until Congress should legislate upon the subject; or is it of such a nature, so extensive and national in character, that it could only be dealt with by Congress? We do not think it is the latter. It is not at all similar in its nature to the case above cited of *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. In one sense it affects the

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transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until Congress speaks upon the subject, it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor. The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that in regard to such a message as the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery) at least so far as legislation of the state tends to enforce the performance of duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of this Georgia statute. * * * While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject." In Lake

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Shore, etc., R. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, the validity of a statute of Ohio was assailed which in terms provided that each railroad company "shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at each station, city, or village containing over three thousand inhabitants." In delivering the opinion of the court, Mr. Justice Harlan observed: "The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if, in the contingency named in the statute, the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is three minutes. Certainly, the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory." It was held in *United States v. Morsman* (D. C.) 42 Fed. 448, that the "interstate commerce law only applies to common carriers engaged in operating lines of railway, or railway and water lines combined, and that it does not apply to 'express companies' properly so termed; that is to say, to independent organizations that carry on the express or parcel business in the usual manner, and which do not operate railway lines." Without pausing to consider the correctness of this declaration, we may say that we are satisfied that no federal enactment exists which is at all indicative of a purpose upon the part of Congress to regulate the personal delivery of parcels sent by express. See *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. It is our conclusion, so far as concerns the objection that the statute is invalid as an attempted regulation of interstate commerce, that it is competent for the state to require carriers by express, under a penalty, to live up to their obligations under the general law in respect to the delivery of packages in this state, and that, therefore, the objection is not well taken.

It is contended on behalf of appellant that it is not a foreign corporation, that it enjoys no franchises or grants of power from the state, and that, therefore, it is not subject to legislative regulation in the transaction of its legitimate business. Treating the first premise as correct, it follows that appellant is not subject to control by the state to the same extent that it would be if it were a foreign corporation; but it by no means follows from the premise that appellant and other like associations are not subject to any control by the state as respects the manner in which they shall transact their business. The power of the Legislature concerning domestic affairs, whether it be called police, governmental, or legislative power, authorizes it to make all manner of reasonable laws not forbidden or restrained by the federal or

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state Constitutions, which look to the regulation of the relative rights and duties of all persons and corporations within the jurisdiction of the state. *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Cooley, Const. Lim.* (7th Ed.) 829; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190, and cases cited. The public character of the service which express companies perform is shown by the following quotation from *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791: "The express business * * * has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life." In the case last cited it was held that, while it is the duty of railroad companies to carry express matter for the public, yet they can devise their own means for the carriage, provided, of course, there is reasonable promptness and security. It was further held in that case that, as the express company must be reasonably sure of the means required by it for transportation, and as its business on important lines is often so extensive as to require that cars shall be set apart for its use, the railroad company is not under any obligation to furnish other express companies with equal facilities for doing an express business over its line. The result of this has been that there has grown up between the railroad companies and the express companies doing business over them, as was said in *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 511, 20 Sup. Ct. 385, 44 L. Ed. 560, "to a certain extent a sort of partnership relation * * * in carrying on a common carrier business." The only logical ground on which these carriers by express can justify their existence, as pointed out by Judge Redfield, is as an auxiliary to carriers by railroad and boat, which can only make warehouse delivery. It would be a strange and startling doctrine that by failing to assume the corporate capacity express companies, which have grafted themselves onto public corporations that enjoy the grant of extraordinary powers from the state, and which divide with them the profits of a business in the proper performance of which the entire public has an interest, can take up a local habitation and do business in the state, and yet successfully defy the effort of the lawmaking power to compel them to live up to their common-law obligations. Such a view of the law is profoundly erroneous. In the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77—a

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case of which it at least may be said that it is one of the most important cases which the Supreme Court of the United States ever decided, since it settled the question as to the power of the state reasonably to regulate the conduct of those who are engaged in the performance of a service which is clearly of a public character—it was said that under the powers of government “it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. * * * This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is ‘affected with a public interest it ceases to be *juris privati* only.’ This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Hard. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control.” While the courts have had frequent occasion since to pass upon cases which it was contended were ruled by this case, yet its essential doctrine of the right reasonably to regulate the conduct of both corporations and individuals engaged in the performance of duties which are clearly of a public character has never been departed from. See *Cotting v. Godard*, 183 U. S. 79, 22 Sup. Ct. 60, 46 L. Ed. 92. We do not think that further discussion upon this branch of the case is necessary.

It is urged on behalf of appellant that the act is a deprivation of liberty and of property without due process of law, and that it is for this reason in contravention of the fourteenth amendment. Preliminary to a discussion of this objection attention may be called to the fact that a constitution is presumed to relate to that which was recognized by the people as vital and fundamental, and that a legislative enactment is not to be overthrown because the court may be of opinion that it is harsh in its oper-

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ation, or that it would have been wiser to have allowed a larger freedom to the individual. As was said by Mr. Justice Holmes in *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of mortality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all; otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*." Under the police power persons may be deprived of both liberty and property, at least in a sense, and that without redress, provided that it be by due process of law. Of course, the mere act of the legislative power does not necessarily amount to due process of law, or, what is its equivalent, the law of the land. *McKinster v. Sager* (Ind. Sup.) 72 N. E. 855, and cases there cited. However, every presumption must be indulged by the courts which the circumstances reasonably admit of that the legislative authority was warranted in enacting the statute. "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts." *Frishie v. United States*, 157 U. S. 160, 165, 15 Sup. Ct. 586, 39 L. Ed. 657. It was held in *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, that an act of Congress providing that it should be unlawful to pay any seaman's wages in advance of the time that he had actually earned the same was valid, because the obligations of the sailor and his temptations in foreign ports were such as to make the restriction a reasonable one.

We have before us the concrete case of a failure upon the part of the express company to deliver a package to the consignee at his residence, as it was implied it would do from the acceptance of the package so addressed. The statute is so far lacking in specific requirement that the court might imply an exception in favor of a case where, as a matter of violation, there had been a contract entered into to make the carrier's agent the agent to receive delivery. "The general terms of a statute are subject to implied exceptions founded on rules of public policy, and the maxims of natural justice, so as to avoid absurd and unjust consequences." 2 Lewis' Suth. Stat. Const. § 385; *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154. And the court will not adopt a construction of a statute which the words do not impel it to, when to do so would be to bring

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the enactment in conflict with the fundamental law. *People v. Board of Education*, 13 Barb. 400, 409; *Endlich*, Inter. of Stat. §§ 178, 179. It will be time enough when it arises to deal with a case where it appears that what is in form a contract is only modal, or has been exacted by the carrier. See *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 506, 20 Sup. Ct. 385, 44 L. Ed. 560; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

The last contention assigned as a ground for the overthrow of the statute is that it is in violation of section 21 of the Bill of Rights of the constitution of Indiana. We content ourselves upon this point with the statement that we do not perceive that the statute contravenes said section.

Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v. CHICAGO PORTRAIT CO.

(Supreme Court of Georgia, Jan. 30, 1905.)

[49 S. E. Rep. 727.]

Action on Contract—Construction of Petition.—Where a petition can be construed either as a suit in contract or as an action for a breach of duty arising out of the contract, the latter construction will be adopted.

Unclaimed Freight—Conversion.—The shipment by a common carrier of nonperishable merchandise from the point of destination to another point on the line of its railway, for the purpose of sale as unclaimed freight, within less than six months from the time such goods arrive at destination, is a conversion of the same in the county where the point of destination is located.

Same—Same—Liability—Right to Invoke Agreed Valuation.—In an action of tort against a common carrier for the conversion of goods consigned to the plaintiff the carrier cannot take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage.

Same—Same—Damages—Expenses of Plaintiff's Agents.*—In an action of the character above indicated the expenses of the plaintiff's agent, incurred while waiting for the delivery of the freight upon the statement of the agent of the carrier that the same had not arrived, when in fact it was then in his possession, is too remote to be the basis of a recovery against the carrier.

Attorney's Fees.—The allegations of the petition were not sufficient to authorize the recovery of attorney's fees.

Damages—Sufficiency of Evidence.—The evidence authorized a verdict for the actual value of the goods converted, and the judgment is affirmed upon condition that all other sums be written off.

(Syllabus by the Court.)

Error from City Court of Albany; R. Hobbs, Judge.

Action by the Chicago Portrait Company against the Cen-

*See note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481.

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tral of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

The Chicago Portrait Company brought suit against the Central of Georgia Railway Company, alleging that it delivered to the railway company in Chicago five boxes of nonperishable merchandise, to be transported by the defendant and its connecting carriers to Albany, Ga.; that the merchandise was delivered to the defendant company, and by it transported to its destination; that it reached Albany in good order; and that the defendant converted the same by causing it to be shipped to Savannah, Ga., as unclaimed freight, and there sold at public outcry, within less than six months after the same had arrived at Albany. The defendant filed special demurrers to the petition, a plea to the jurisdiction, and an answer. The trial resulted in a verdict for the plaintiff, and the defendant assigns error upon the judgments overruling its demurrers, plea to the jurisdiction, and a motion for a new trial.

Wooten & Hofmayer, for plaintiff in error.

S. J. Jones and Mayson, Hill & McGill, for defendant in error.

COBB, J. 1. We think the petition can be properly construed as seeking to recover for a tort committed in converting the goods. But even if the language of the petition is equivocal, any doubt as to its meaning is to be resolved by construing it as an action for a tort, rather than as an action for a breach of the contract of transportation. It has been said that in cases where the plaintiff has a right to elect to sue either upon a contract or for a tort arising out of a breach of duty under the contract, the petition, if equivocal in its terms, will be construed as claiming damages for the tort. *Aiken v. Southern Railway Co.*, 118 Ga. 120, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.

2. The suit was brought in the city court of Albany. The goods were sold in Savannah. The plea to the jurisdiction set up that the suit was improperly brought in Dougherty county, but should have been brought in Chatham county, where the sale took place; it being claimed that there was no conversion of the goods until the sale took place. The sale was undoubtedly a conversion; but we think the conversion was complete when the agent at Albany shipped the goods to Savannah as unclaimed freight, for the purpose of sale, within less than six months after they had arrived at destination. See Civ. Code 1895, § 2303. The plaintiff might have sued in Savannah, but it certainly had a right to sue in Albany.

3. It was contended that the contract of transportation was an Illinois contract, and was therefore to be governed by the laws of that state, and that under such laws a common carrier has a right to make a special contract, upon a sufficient consideration, limiting its liability for negligence and fixing the

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amount to be recovered in the event of a loss; and that under the contract made in this case with the initial carrier in Illinois, if the plaintiff was entitled to recover at all, it was entitled to recover only \$5 for every 100 pounds of freight. We do not find it necessary to determine in this case whether the contention as to the law of Illinois is correct, or whether, if correct, that law is applicable to the contract of carriage referred to in the petition. This suit is not brought for a breach of the contract of carriage. The wrong complained of is a conversion of the plaintiff's goods after the contract of carriage was completed. As was well said by Mr. Justice Lamar in *Georgia Southern & Florida Railway Company v. Johnson*, 121 Ga. 231, 48 S. E. 808: "In an action of trover or damages for conversion the tortfeasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

4. The plaintiff claimed as a part of its damages the expenses of its agent while he was waiting at Albany for the goods to arrive, after four of the boxes had reached there, and the agent had informed him that the other would soon come, when in fact it had actually arrived at the time. We do not think damages of this character could be properly recovered. They do not flow directly from the wrongful act, and are too remote to be the basis of a recovery. The court therefore erred in not striking upon demurrer that portion of the petition which claimed these damages.

5. In the ninth paragraph of the petition appears the following allegation: "Petitioner insists that, as it has made every effort for the past year and a half to get a settlement of this claim out of said Railway without success, and said company's persistent refusal to settle or pay the same entitles petitioner to recover from said company its reasonable attorney's fees incurred in bringing and prosecuting this suit, which it shows is the sum of one hundred dollars." The averments just quoted were specially demurred to on the ground that they did not set out any legal reason why the defendant should be subjected to a claim for attorney's fees. We think this demurrer was well taken. Attorney's fees are not generally allowed a litigant, but the Code declares that they may be allowed if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. Civ. Code 1895, § 3796. There was no allegation that the defendant had acted in bad faith, or had been stubbornly litigious, nor was it in terms alleged that it had caused the plaintiff unnecessary trouble and expense. The averment was, in effect, merely that the defendant had so acted as to compel the plaintiff to bring a suit to recover the amount due it. This is not sufficient to tax the defendant with attorney's fees. *Pferdmenges v. Butler*, 117 Ga. 400, 43 S. E. 695; *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 45 S. E. 426.

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6. While there are other assignments of error, none of them are of such a character as to require an extended discussion, and any error that may have been committed would not be sufficient of itself to require a reversal of the judgment. The evidence fully authorized a judgment in favor of the plaintiff for the sum of \$138.60 as the value of the articles lost; and, as this exact amount was sued for, and no interest was claimed in the petition, the recovery should have been limited to this sum. *Ga. R. Co. v. Crawley*, 87 Ga. 192, 13 S. E. 508. If the plaintiff will write off from the verdict and judgment the attorney's fees found and all damages except \$138.60, the judgment will be affirmed; otherwise a judgment of reversal will be entered.

Judgment affirmed on condition. All the Justices concur.

NASHVILLE, C. & ST. L. RY. et al. v. STONE & HASLETT.

(Supreme Court of Tennessee, Feb. 6, 1904.)

[79 S. W. Rep. 1031.]

Carriers—Limiting Liability to Own Line.*—A stipulation that a carrier's liability for live stock shipped shall cease on its delivery to a forwarding carrier is valid without regard to consideration, the carrier being under no obligation to carry the live stock beyond its own terminus.

Same—Same—Injury to Live Stock—Liability.—Where a carrier forwarded hogs according to the earliest practicable schedule time, which, as the shipper previously knew, involved a delay of four hours at one point, and the hogs were delivered in good condition to a forwarding carrier, and the first carrier had stipulated that its liability should cease when they were delivered to the forwarding carrier, it was not liable for the injured condition of the hogs when delivered to the consignee.

Same—Limiting Liability.†—While a carrier may make a valid contract, where it is fairly obtained, and on sufficient consideration, exempting it from its common-law liability for loss of freight not caused by its negligence, to validate such a stipulation the carrier must offer or be ready on demand to ship the freight with or without such liability, at the option of the shipper.

Same—Same—Right to Repudiate.†—A shipper cannot, in the absence of fraud by a carrier, avoid limitations imposed by a special contract, by showing that he executed it hurriedly, or without due care, or that he was ignorant of its contents.

Same—Same.†—Evidence of shippers of live stock that a carrier had never offered them any contract of shipment except one containing a limitation of its liability was admissible to show that the carrier did not hold itself ready to make a contract of shipment in which it should assume common-law liability.

*See foot-note appended to *Morse v. Canadian Pac. Ry. Co. (Me.)*, 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296.

†See foot-note appended to *Cleveland, etc., R. Co. v. Patton (Ill.)*, 8 R. R. R. 336, 32 Am. & Eng. R. Cas., N. S., 336, where all the preceding authorities in this series are collected.

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Same—Loss of Goods—Liability—Burden of Proof.†—Where there has been a loss of goods in shipment by a carrier, in the absence of a contract limiting its liability, the carrier must show affirmatively that the loss resulted from a cause for which it was not responsible; such as the act of God or the public enemy.

Same—Limiting Liability—Negligence—Burden of Proof.§—Where a shipment by a common carrier is under a limited liability contract, and a loss falls within one of the excepted causes, the burden is on the shipper to show negligence.

Same—Same—Injury to Live Stock in Transit—Negligence—Sufficiency of Evidence.—Evidence that there was a delay of seven hours unaccounted for in the shipment of hogs from Nashville to Louisville, that the weather was very warm and the hogs were left exposed to the sun, that while they were in the carrier's possession they had been in transit for over 28 hours without being fed or watered as required by act of Congress in interstate shipments, and that when they were delivered nearly a third of the hogs were dead, was sufficient to show negligence on the part of the carrier, so as to render it liable for the loss, notwithstanding a special contract limiting its liability.

Same — Same — Stipulation Concerning Value — Construction. — Where it was agreed in a contract for the shipment of hogs that the value for which the carrier should be liable in case of loss should not exceed for "a horse or mule \$100, cattle \$30 each, * * * other animals at \$5 each," the term "other animals" included the hogs.

Same—Same—Same—Evidence.—The market value of hogs lost in shipment was admissible in evidence notwithstanding a contract limiting liability for their loss to \$5 each, where the validity of the contract, as to consideration and otherwise, was in issue, and the court charged that, if it was valid, the recovery should be limited to \$5 each.

Same—Same—Same—Reasonableness.—Where it was agreed in a contract for the shipment of hogs that the value for which the carrier should be liable should not exceed \$5 each, while their real value was two or three times that amount, the stipulation was unreasonable and void.

Appeal from Circuit Court, Bedford County; W. C. Houston, Judge.

Action by Stone & Haslett against the Nashville, Chattanooga & St. Louis Railway and another. From a judgment in favor of

†As to the burden of proving that the carrier is liable for loss of or injury to freight, see foot-note appended to *Nelson v. Great Northern Ry. Co.* (Mont.), 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311 (burden of proving negligence where shipper goes in charge of stock); *Mouton v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673 (burden of proof on carrier to show absence of negligence where goods were not delivered); *Grieve v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 669; *Milam v. Southern Ry. Co.* (S. Car.), 18 Am. & Eng. R. Cas., N. S., 253; *Mitchell v. Carolina Cent. R. Co.* (N. Car.), 13 Am. & Eng. R. Cas., N. S., 201; *Norfolk & W. Ry. Co. v. Reeves* (Va.), 16 Am. & Eng. R. Cas., N. S., 166; *Central of Georgia Ry. Co. v. Howard* (Ga.), 21 Am. & Eng. R. Cas., N. S., 15; *Cooper v. Raleigh & G. R. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 412; *Texas & P. Ry. Co. v. Richmond* (Tex.), 21 Am. & Eng. R. Cas., N. S., 847 (burden of proof on carriers to show that loss by fire was not caused by negligence where contract is under common law); *Willett v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 141, 31 Am. & Eng. R. Cas., N. S., 141 (presumption as to which connecting carrier is responsible).

§See foot-notes appended to *Caw v. Texas & Pac. Ry. Co.* (U. S.), 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303.

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plaintiffs, defendants appeal. Reversed as to defendant Nashville, Chattanooga & St. Louis Railway, and affirmed as to defendant Louisville & Nashville Railroad Company.

Cooper & Cooper and *C. S. Ivie*, for railroad companies.

Claude Waller and *J. D. B. De Bow*, for Nashville, Chattanooga & St. Louis Ry.

Ino. Belle Kuble, for Louisville & N. R. Co.

W. B. Bates and *Thos. R. Myers*, for Stone & Haslett.

MCALISTER, J. Stone & Haslett recovered a verdict and judgment in the circuit court of Bedford county against the defendant railroad companies for the sum of \$900 as damages for injuries to four car loads of hogs shipped from Shelbyville, Tenn., to Louisville, Ky.

Both defendants appealed and have assigned errors.

The cause of action, as outlined in the first count of the declaration, was as follows:

"That at 4 o'clock on September 2, 1899, they (plaintiffs) delivered in good condition at Shelbyville, Tenn., to the defendants, as such common carriers operating such connecting lines, 363 head of hogs, the property of the plaintiffs, contained in four cars of the defendants, and in consideration of the sum of \$164—being \$41 per car, and the full tariff rate charged by the defendants for the transportation of said freight—which was paid at the time by the plaintiffs to the defendants, and for which the defendants, as common carriers, received said hogs to be safely carried and delivered within a reasonable time in like good and sound condition in which they were received, to plaintiff's consignees, Mansfield and Jeffries, at Louisville, Kentucky; and the plaintiffs aver that the defendants failed to deliver said hogs within reasonable time and in good and sound condition, as they were bound to do, but, on the contrary, wrongfully and negligently delayed said hogs in transit to their destination, and kept them confined in the cars in which they were shipped without food, water, or rest for more than twenty-eight hours after receiving same, when they should and could have been delivered at their destination within seventeen hours from the time they were received; and by reason of the negligence of the defendants and unreasonable delay in the transportation and delivery of said hogs and freight to plaintiff's consignees 113 of said hogs perished and died, being of the value of \$1,043.19, which was a total loss to the plaintiff," etc.

It will be observed that under this count plaintiff sought to recover for a breach of the carrier's common-law duty.

The second count of the declaration sets out a written contract of affreightment and alleges a breach of said special contract.

The defendants pleaded the general issue, and also the following special defenses, viz.: (1) That the Nashville, Chattanooga & St. Louis Railway received the hogs under the written

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contract, and that it transported them with reasonable diligence from Shelbyville to Nashville, and at the latter point delivered them in good condition, within a reasonable time, to the Louisville & Nashville Railroad Company. (2) That it only agreed to transport the hogs from Shelbyville to Nashville, and at the latter point to deliver same to its connecting carrier. (3) That the several clauses of the written contract limiting defendant's common-law liability are valid, and that these clauses exempted from all liability except for gross negligence; that there was no negligence; and that in no case can there be recovered for more than \$5 per head, this being the amount agreed upon as the reasonable value of the animals shipped.

Plaintiffs file replications to the pleas of the Nashville, Chattanooga & St. Louis Railway, averring that the written contract was without a valuable consideration; that plaintiffs were imposed upon and deceived by defendant's agent; and that the live stock contract was a fraudulent device, conceived for the purpose of avoiding its common-law liability as a common carrier.

The Nashville, Chattanooga & St. Louis Railway filed demurrers to these replications, assigning various causes, but which demurrers were disallowed and overruled by the court.

The first assignment of error is that there is no evidence to support the verdict. This assignment of error is based upon the assumption that the special contract of shipment entered into between the parties was valid and enforceable, and that the plaintiff failed to show a breach of any stipulation of the special contract. It is denied by the defendants that the written contract was supported by any consideration. It is charged that it was not fairly obtained, for the reason that the shipper had no choice of a contract with and without the common-law liability of the carrier. One of the stipulations of the written contract was that the Nashville, Chattanooga & St. Louis Railway was to be liable for loss or damage only while the stock was being transported upon its own line. It is provided therein that the Nashville, Chattanooga & St. Louis Railway shall transport each car load of stock from the initial point of shipment to Nashville, Tenn., but it guarantees a through rate of freight to Louisville, Ky., the final destination. The specific stipulation of the contract is as follows:

"It is further distinctly understood by the parties hereto that all liability of the Nashville, Chattanooga & St. Louis Railway, as carrier of the said stock, shall cease at its destined station, if on said company's railroad; but if it destined to a point beyond said company's railroad, then at the company's freight station at its terminus, when ready to be delivered to the owner, consignee or carrier whose line may constitute a part of the route to destination."

In *Merchants' Dispatch Transportation Company v. Bloch Bros.*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847, it was said as follows:

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"It is likewise settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another."

This doctrine is approved in the case of *Bird v. Railroad Company*, 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856, in the following language:

"The contract of shipment was made between the shipper and the initial carrier, and was for through transportation from receiving point to destination. The printed form, contract, or bill of lading then in use by the carrier contained the provision that in case of loss, damage, detriment, or delay the railroad in whose actual custody the goods were at the time of such loss, damage, detriment, or delay shall alone be responsible. The first carrier had the legal right at its election to undertake the transportation of the goods to the terminus of its own line merely, or to their ultimate destination. It was under no legal obligation, in the first instance, to transport them beyond the end of its own line, and for that reason it was authorized in law, when contracting for through transportation, to limit its liability by the clause mentioned." *Railroad Co. v. Brumley*, 5 Lea, 401; *Dillard Bros. v. Railroad Co.*, 2 Lea, 288; *Telegraph Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318; 4 Elliott on Railroads, § 1432; Hutchinson on Carriers, § 149b.

In the case of *East Tennessee, Virginia & Georgia Railroad Company v. A. P. Brumley*, 5 Lea, 401, the headnote is as follows:

"A railroad company receiving goods for shipment beyond the terminus of its line may, by special contract, protect itself against liability for loss not occurring on its line. And such contract will be presumed from a fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading."

In view of these principles and the special contract in this case, the duty imposed upon the Nashville, Chattanooga & St. Louis Railway was to promptly deliver in good condition the consignment of hogs to its connecting carrier. It was not necessary that such a stipulation be supported by any consideration. The common-law liability of the common carrier did not extend beyond the terminus of its own line, and there is nothing in this contract limiting the common-law liability of defendant company on this subject. Such a stipulation in a contract has uniformly been upheld regardless of consideration.

The question, then, is presented whether any loss or injury to this consignment of hogs occurred while it was in transit on the road of the Nashville, Chattanooga & St. Louis Railway.

The proof is undisputed that the shipment of hogs left Shelby-

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ville for Wartrace on defendant's road at 4 o'clock p. m. on September 2, 1899. The train reached Wartrace without delay or accident of any kind at 4:50 p. m. The first freight train to Nashville on the main line after the hogs arrived at Wartrace was due at Wartrace at 8:20 p. m. This train arrived at 8:50 p. m., or 30 minutes late. The car load of hogs was attached to this train, and carried to Nashville, reaching the latter point at 12:40 a. m., being 10 minutes late. The regular schedule of the company between Shelbyville and Nashville for shipments of live stock was that they should leave Shelbyville at 4:20 p. m., and make connection at Wartrace at 8:20 p. m. This schedule had been observed for a long time, and the evidence shows that plaintiffs were thoroughly familiar with this schedule when they made the shipment. It was stated that they selected the afternoon train on account of the hot weather, and to get the benefit of the night run.

The proof is undisputed that when the four car loads of hogs left Wartrace and reached Nashville the hogs were in good condition. It appears that four hours elapsed from the arrival of the hogs at Wartrace until their departure, but no negligence is imputed to defendant company on this account, since it forwarded the hogs on its first freight train leaving Wartrace after their arrival. No duty devolved upon defendant company to make up a special train and forward these hogs to Nashville, especially as the shippers were advised of the forwarding train, and consigned the hogs from Wartrace to make connection with that particular train. They were well aware that the delay at Wartrace would be unavoidable in order to make connection with the first forwarding freight train to Nashville. As already stated, the hogs reached Nashville at 12:40 a. m., and, in accordance with an established usage existing between the two railroad companies, the cars containing the hogs were delivered to the Louisville & Nashville Railroad Company on what is known as the "Clay Street Track." It appears from the record that this track transfer was in charge of a joint clerk representing both companies, and that this clerk, in accordance with his duty, kept a record of the cars of stock delivered by the Nashville, Chattanooga & St. Louis Railway upon this transfer track for transportation over the Louisville & Nashville Railroad. The record kept by this clerk shows that these particular cars were delivered upon said transfer track by the Nashville, Chattanooga & St. Louis Railway at 1:50 a. m., September 3, 1899, and the hogs were apparently in good condition. The proof is that this was a delivery by the Nashville, Chattanooga & St. Louis Railway to the Louisville & Nashville Railroad Company, and was so regarded by both companies. It further appears that these cars were transferred by the Louisville & Nashville Railroad from the Clay Street line at 2:50 a. m., and delivered in East Nashville at 2:58 a. m. It further appears that the train containing these four cars left Nashville for Bowling Green, Ky.,

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at 4:45 a. m., September 3d. The proof shows that Bowling Green was reached at 10:45 a. m., September 3, 1899, and the hogs were then in good condition. The train left Bowling Green at 12:30 a. m., September 3d, and arrived at Louisville that evening about 8:25 o'clock. The proof is undisputed that the hogs sustained no injury in course of transportation over the line of the Nashville, Chattanooga & St. Louis Railway. Indeed, it is shown by evidence which is not controverted that nine hours after the hogs were delivered to the Louisville & Nashville Railroad Company they were in good condition. The only suggestion of negligence chargeable to the Nashville, Chattanooga & St. Louis Railroad Company is that the hogs were permitted to remain at Wartrace four hours before being forwarded to Nashville; but, as already stated, they were shipped at the earliest practicable schedule time, and this fact was well known to the shippers before the hogs left Shelbyville. As already stated, no duty was imposed upon defendant company to make up a special train and forward these hogs to Nashville in view of the facts stated.

So we conclude there is no evidence whatever in the record to support the verdict of the jury so far as it attached any liability to the Nashville, Chattanooga & St. Louis Railway Company for injury and loss in this shipment.

We will now proceed to consider the assignments of error made on behalf of the Louisville & Nashville Railroad Company.

The sixth assignment is as follows:

"Common carriers may limit or exempt themselves from common-law liability by special contract, except for their own negligence or that of their employees, provided the contract is made upon a genuine consideration to the shipper to compensate him for surrendering his right to hold the railroad liable as a common carrier, and that the contract is fair and reasonable in view of all the circumstances; and, further, that the shipper assents to the same knowingly and understandingly. It is a question of fact for them to decide from the evidence whether this contract was knowingly and fairly accepted by the plaintiff, so as to make it binding."

It is also objected that the court charged: "If the shipper assents to the same knowingly and understandingly; that is, he may have the option and choice that he can ship under the common-law contract, which gives the carrier no exemption from common-law liability, by paying more for this way of shipment, or that he can ship by special contract at a less rate, which gives certain exemptions to the carrier, so that he can have the alternative of choosing between two terms of shipment."

Again, the court charged: "The defendants had a right to a special contract to limit their liability, not from their own negligence; but to do this they were bound to give to the plaintiffs at the time an opportunity to choose upon just and reasonable

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terms between the special contract and the common-law contract that made them liable for full damages."

Now, it is insisted that in these instructions the court committed two errors, viz.:

(1) In holding that, in order to make the contract valid and binding, it must appear that the shipper assented to it knowingly and understandingly.

(2) That it was also necessary to the validity of such a contract that the shipper must have been given at the time an opportunity to choose between the two contracts.

It is insisted that the only duty required of the carrier was that he should be ready and willing to accept the stock upon its common-law liability, if demanded by the shipper.

It is further insisted that it was not incumbent upon the agent of the company to notify the shipper of the two forms of contract, or to give to the shipper at the time an opportunity of choosing between the two contracts.

These limited carrier contracts have frequently been before this court for consideration, and the principles of law governing them are well settled. In the case of *Railroad Co. v. Manchester Mills*, 88 Tenn. 655, 14 S. W. 315, this court said, viz.:

"A contract exempting the carrier from liability for the loss by fire, not due to negligence, and based upon a sufficient consideration, the shipper having the right to elect between a liability with and without fire clause, is valid, and a through bill of lading, where the shipment is over more than one line, or upon reduced rates, is a sufficient consideration." In the case last referred to the court says:

"It is well settled that a common carrier may make a stipulation in its bill of lading to limit its common-law liability for loss or damage of freight not caused by its own negligence, but this cannot be validly done unless the carrier at the time holds himself in readiness to transport the freight with or without such limitation, and allows the shipper a reasonable and bona fide alternative between the two modes of shipment." The same rule is laid down in the following cases: *Railroad v. Gilbert Parks & Co.*, 88 Tenn. 431, 12 S. W. 1018; *Railroad Co. v. Wynn*, 88 Tenn. 321, 14 S. W. 311; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 31, 14 S. W. 317, 24 Am. St. Rep. 586; *Railroad Co. v. Craig*, 102 Tenn. 301, 302, 52 S. W. 164.

In the case of *Gilbert Parks & Co.*, 88 Tenn. 430, 12 S. W. 1018, Judge Caldwell, speaking for the court, among other things, said, viz.:

"It is not every such special contract, however, that is effective. To be valid, it must be fairly obtained, and just and reasonable." Again, the court says:

"A company standing before the public as common carrier, and enjoying the advantages and franchises as such, must be ready to do the business of a common carrier, with the full measure of the responsibility imposed by the common law; and

it at the same time may offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer or readiness to transport the goods of its customer with the one or other degree of responsibility, at his option, is as little as can be required of any common carrier. Less than this does not present a bona fide and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company."

In *R. R. Co. v. Sowall*, 90 Tenn. 24, 15 S. W. 838, the court said, viz.:

"Both the witnesses for plaintiff and defendant agreed that no other contract than that signed was tendered, but they also agreed that no other was demanded. It was therefore competent for the defendant to show that it was willing and ready to execute another upon terms reasonable to the shipper, if he preferred it, in which no agreed valuation or limitation of liability was required as a prerequisite to the shipment. He need not specifically tender another contract. An offer or readiness to make it is sufficient. *Railroad Co. v. Gilbert Parks & Co.*, 88 Tenn. 431-435 [12 S. W. 1018]; *Railroad Co. v. Manchester Mills*, 88 Tenn. 653 [14 S. W. 314]."

This principle is also recognized in the case of *Deming & Co. v. Merchants' Cotton Press, etc., Co.*, 90 Tenn. 327, 17 S. W. 93, 13 L. R. A. 518, where the following language is used:

"The option need not in fact be offered to the shipper. It is sufficient if it would have been given had he demanded it"—citing *Railroad Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Louisville & Nashville Railroad Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

It is conceded by plaintiffs that they did not demand any other contract of affreightment, while the agents of the company admit that they did not offer any other alternative than the live-stock contract, but claim they would have shipped the hogs under common-law liability if plaintiff had so required. The written contract recites on its face that it is made in consideration of a special rate lower than the tariff rate charged when this contract is not executed. The regular tariff rate was double the rate charged in this live-stock contract as appears therein.

It will be observed that the charge of the circuit judge embodied the salient features presented in the text of the cases decided by this court, and in many instances the exact language of the court is imported into the charge.

But it is said that mere readiness on the part of the carrier to issue a common-law bill of lading, if demanded by the shipper, was all that is required.

The circuit judge, in his charge, embodied this idea in the following language, viz.: "The plaintiffs are entitled to have the bona fide alternative of choosing between the two contracts, and an offer or readiness to ship the hogs with either contract on the part of the defendant's agent was necessary, and was suffi-

cient. If the counsel desired more explicit instructions on this branch of the case, supplementary requests should have been submitted; but certainly the court, in its general charge, has presented the law on this subject as laid down by the decisions of this court.

"The court further instructed the jury that an agreement to ship the hogs at a less rate than their regular tariff rate would be a valuable consideration to plaintiff to accept the special contract. An agreement or the giving of a bill of lading through to Louisville would be a valuable consideration, and in deciding whether there was a fair consideration for the special contract you will decide what was the regular tariff rate—whether it was \$82 per car, or whether it was \$41 per car. Also the giving of free transportation to plaintiff or his employees would be a valuable consideration."

The proof showed that the live-stock contracts were signed both by the railroad agent and the shippers, and that for many years the shippers had been signing similar contracts, and must have been aware of their contents. "The shipper cannot avoid the limitations imposed by the special contract by showing that he executed it hurriedly, or without due care, nor by showing that he was ignorant of the provisions of the contract. If he executed the contract by affixing his signature, or by accepting without objection a receipt containing the limitation, he will be conclusively presumed to have assented to its provisions, no fraud on the part of the carrier appearing." Am. & Eng. Ency. of Law, vol. 5, p. 300; *Coles v. Louisville R. R. Co.*, 41 Ill. App. 607; *Johnstone v. Richmond*, 39 S. C. 55, 17 S. E. 512. In the latter case the court said: "The shipper was not obliged to sign the contract without reading it, and, if he saw fit to do so, he must take the consequences." Again, it was said by Mr. Justice McGowan in *Bethea v. Northwestern R. R. Co.*, 26 S. C. 96, 1 S. E. 376, viz.: "It would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract, and assented to its provisions." *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Hill v. Syracuse, etc., R. R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163.

In the first line of the contract it is recited that the tariff rate on this shipment from Shelbyville, Tenn., to Louisville, Ky., is \$82 per car; thus indicating clearly to the shipper the regular tariff rate. It is then recited that the company will transport the stock at the reduced rate of \$41 per car in consideration that the shipper will accept certain risks of transportation. The record shows that the shipping agents of defendant company had instructions to issue a bill of lading with common-law liability if

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the shipper demanded it, and that the tariff rate on such a bill of lading should be twice the special rate. It is shown that the agent of the company at Shelbyville was authorized to receive these hogs for shipment without the execution of a special live-stock contract, but upon the company's common-law liability. There is other evidence that the agent at Shelbyville stood ready and willing to receive live stock for transportation without the execution of the live-stock contract.

The next assignment of error is that the court erred in admitting, over the objection of defendants, the testimony of the plaintiffs below and of other shippers to the effect that they had no knowledge of any bill of lading for the shipment of live stock other than the special live-stock contract under which this shipment was made, and did not know of any other contract under which stock could have been shipped; that they had never been offered any other or different contract in all their experience as shippers.

We think this testimony was relevant to the issue whether defendant company had a common-law contract of shipment, and held itself in readiness to give the shipper the benefit of such an alternative. These shippers, it appears, had been transacting business with the company for many years, and had never been advised of such alternative contract. In this view the evidence was competent for the purpose of contradicting the evidence introduced on behalf of the company tending to show that the company held itself in readiness to give the shipper the benefit of such common-law contract.

The sixth assignment is that the court erred in instructing the jury as follows:

"It devolves upon the plaintiff to make out his case by a preponderance of the evidence, but, if the hogs were delivered to defendants in good condition, and put in the cars in proper amount, and when they reached their destination any part of them were dead or injured, the burden of proof is upon the defendants to show that they are not guilty of negligence in causing their death or damage. The mere fact that the hogs were dead when they reached their destination at Louisville does not absolutely fix the liability upon the defendants, but devolves upon them the necessity of showing that their death did not result from their fault or negligence."

This language, as applied to the special limited contract, would be erroneous; but the court immediately proceeds to explain that this is the rule that would apply if the contract was not binding—that is to say, upon the common-law liability of the carrier; but, if the contract was binding, and the loss was caused by delay in transportation, the company would be exempt from liability by the special conditions of the contract, and in such a case the burden of proving negligence would devolve upon plaintiffs. This was a correct exposition of the law. In the absence of a special contract limiting his liability, the carrier must affirm-

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atively show that the loss was occasioned by some cause for which he was not responsible—as, for instance, the act of God or the public enemy—but where there is a limited liability contract, and the loss falls within one of the excepted causes, the burden of proof is upon the shipper to show negligence.

In the case of *Railroad Company v. Manchester Mills*, supra, one of the questions at issue was in respect of the burden of proof where the contract of shipment exempted the company from liability by loss from fire, and the court in that case held as follows:

“In a suit against a common carrier for loss of goods shipped on a valid contract exempting from liability by loss from fire not due to its own negligence, proof of the mere fact of the loss of the goods by fire, without more, raises no presumption of negligence against the carrier. The plaintiff must in such case aver, and the burden of proof lies upon him to prove affirmatively, that the loss by fire resulted from the carrier’s negligence.” *Hutchinson on Carriers*, § 767; *Railroad v. Mitchell*, 11 Heisk. 404; *Sommers v. Mississippi & Tennessee R. Co.*, 7 Lea, 201; *Merchants’ Dispatch, etc., Co. v. Bloch Bros.*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; *Burke v. Louisville & Nashville R. Co.*, 7 Heisk. 462, 19 Am. Rep. 618; *Railway Co. v. Wynn*, 88 Tenn. 331, 14 S. W. 311; *Runyan v. Caldwell*, 7 Humph. 134; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *M. & C. R. R. v. Holloway*, 9 Baxt. 188.

The next assignment of error is that there is no evidence to support the verdict and judgment against the Louisville & Nashville Railroad Company. The evidence establishes the fact that the cars containing the hogs were delivered upon the Clay Street track by the Nashville, Chattanooga & St. Louis Railway at 1:50 a. m., September 3, 1899, and the evidence is undisputed that this transfer constituted a delivery to the Louisville & Nashville Railroad. The hogs at that time were in good condition. They left Nashville on the Louisville & Nashville Railroad at 4:45 a. m., and reached Bowling Green, Ky., at 10:45 a. m. in apparent good condition. Nine hours had thus elapsed since the hogs left the custody of the Nashville & Chattanooga Railroad, and were still in good condition apparently. The hogs left Bowling Green at 12:30 a. m., September 3, 1899, and arrived in Louisville at 8:25 p. m. the same day. The proof is that the hogs were in bad condition when they left Bowling Green at 12:30, and continued to die between that point and Louisville. It will thus be seen that these hogs remained in possession of the Louisville & Nashville Railroad Company in Nashville for about three hours before they were started for Louisville at 4:45 a. m. There was a further delay of nearly two hours at Bowling Green before the hogs were started for Louisville at 12:30 a. m. in bad condition. They reached Louisville at about 6:30 p. m., but were not de-

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livered to the consignee until about 8:25 p. m., a delay of nearly two hours. Here is a delay of about seven hours wholly unaccounted for by defendant company.

The proof is that the weather was very warm, and the hogs were left exposed to the heat of the sun, standing on the side tracks at these different stations, and when they were finally delivered to the consignee, 116 of the number, or nearly one-third of the entire consignment, were dead. While they were in possession of the Louisville & Nashville Railroad Company they had been in transit or course of transportation for over 28 hours, during which time they had not been fed or watered as required by act of Congress in interstate shipments.

It is conceded by counsel for plaintiffs that until about 12:30 a. m. of the second day—the time of leaving Bowling Green for Louisville—the hogs were in good condition. As stated by him: "It was the last stage of the trip from Bowling Green to Louisville that resulted so disastrously. If these hogs had been delivered in Louisville by mid-day of September 3d, the next day after their shipment, the loss would have been comparatively small. The record shows that the Louisville & Nashville Railroad Co. had the hogs in its possession for a period of nearly 19 hours. The hot ride in the sun on the second day, without food and water, was undoubtedly the occasion of the loss and damage to these hogs."

It is in the proof that a freight train left Nashville for Louisville at 2:35 a. m., September 3d, and it is not satisfactorily explained from this record why these hogs were not forwarded to Louisville on that train, instead of being delayed for a later train leaving Nashville at 4:45 a. m. This in itself is evidence of negligence. We think that there was sufficient evidence to support a verdict against the Louisville & Nashville Railroad Company, conceding that the live-stock contracts are binding.

The last assignment of error is that the court erred in admitting testimony, over the objection of defendants, touching the market value of the hogs that died before reaching the point of destination. The insistence made on behalf of the company is that the value of the hogs is to be determined by the valuation clause contained in the special live-stock contract as follows:

"And it is further agreed that should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a horse or mule, \$100.00; cattle, \$30.00 each; chickens, ducks and guinea fowls, 75 cents per dozen; geese, \$1.00 per dozen; turkeys, \$1.50 per dozen; other animals at \$5.00 each; which amounts it is agreed are as much as such animals herein agreed to be transported are reasonably worth."

In *Railroad Co. v. Sowell*, 90 Tenn. 19, 15 S. W. 837, such a stipulation in a live-stock contract was held valid upon the ground that it was not a mere exemption from liability, but was

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an assumption of liability to the full limit of the value of the property as agreed upon by the parties to the contract. It was said such contract, fairly made, is not void as against public policy, or for any other reason; citing *Hart v. Pa. R. R. Co.*, 112 U. S. 331, 343, 5 Sup. Ct. 151, 28 L. Ed. 717.

It was held in that case that the valuation clause referred to the particular horses injured, and was as definite and specific in effect as though it had named or perfectly described the horses shipped. It was in reference to them, and only them, it became a contract when signed and accepted by the shipper, and needed no more particular reference.

The case of *Railroad Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, was distinguished from the *Sowall Case*, upon the ground that in the former there was no agreement as to the value of the animals shipped.

In *Starnes v. Railroad*, 91 Tenn. 518, 19 S. W. 675, it appeared certain horses were shipped under a live-stock contract which contained the following stipulation: "And it is further agreed that, should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a horse or mule \$100.00, which amount it is agreed is as much as such stock as are herein agreed to be transported are reasonably worth." It was held this was a valid limitation of the liability of the carrier.

It will be observed that the contract now under consideration contains a stipulation almost identical with that adjudged to be valid in the *Sowell* and *Starnes Cases*. It expressly provides that the valuation therein fixed is as much as such stock as are therein agreed to be transported are reasonably worth. The only indefiniteness on the face of the stipulation contained in the written contracts herein is whether the term "other animals" refers to the hogs shipped. We think no other reasonable construction could be placed on the contract. The stipulation in the contract, after specifying a valuation for certain classes of animals and fowls, then provides that the valuation on other animals such as are herein agreed to be transported is fixed at \$5 each as their reasonable worth. It requires no latitude of construction to say that the contract fixing the value of the animals at \$5 each referred to the hogs about to be shipped.

The charge of the court touching this special clause in the contract of shipment is also assigned as error.

The court instructed the jury that, if they found the contract was not binding on the plaintiffs, they would be entitled to recover the market value of the hogs. The court, however, continued: "But, if you find the contract is binding, then you will be limited in the amount you shall find for plaintiffs to the sum of \$5 per hog for each one lost or damaged, it being stipulated in the special contract that this amount is all defendants shall be liable for in the event of loss, and this sum of \$5 per head is

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agreed upon as the amount said hogs are reasonably worth," etc.

There was no error in the action of the circuit judge in admitting the proof touching the market value of the hogs dead and injured, for, if the jury should find that the special livestock contract was not binding upon the plaintiffs for want of consideration, or for other cause explained in the charge of this court, then the value of the hogs would be determined by the market rates prevailing at that time, and not by the special limitations of the contract.

It is evident from the damages assessed by the jury that they did not measure the value of the hogs by the valuation clause in the written contract, but applied the market value of the hogs at the time of their loss and injury. So that the charge of the court, if erroneous, was necessarily prejudicial to defendant companies.

While we are of opinion that the term "other animals," employed in the contract, did refer to the valuation of the particular hogs shipped therein, yet we are of opinion, in view of the value of these hogs at the date of their shipment, that the valuation of \$5 each was an unreasonable valuation. Such stipulations, to be upheld by the court, must be fair and reasonable. The evidence shows that the hogs shipped were worth two and three times the valuation inserted in the written contract. In view of the fact that the shipper has to accept the contract tendered by the carrier in order to get reduced rates of shipment, and has little to do with formulating the details of the contract, the courts hold that such limited liability contracts cannot be enforced by the carrier, unless they are fair and reasonable.

As stated by Mr. Justice Bradley in *Railroad v. Lockwood*, 17 Wall. 379, 21 L. Ed. 627: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the court. His business will not admit of such a course. He prefers rather to accept any bill of lading or sign any paper the carrier presents."

In view of the real value of these hogs at date of their shipment, we cannot think that a valuation clause of \$5 per head is a reasonable stipulation.

The result is the judgment as to the Nashville, Chattanooga & St. Louis Railway is reversed, but affirmed as to the Louisville & Nashville Railroad.

BEHEN *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[85 S. W. Rep. 346.]

Negligence Towards Alighting Passenger—Pleading—Inconsistent Theories—Election.—A petition alleging, not in the alternative, two grounds of negligence—the first, that the car was started, after being stopped, without giving a passenger sufficient time to alight; the second, that the conductor allowed the passenger to get off the car while it was in motion, in violation of an ordinance of the city—was inconsistent in its parts, and a motion to compel an election should have been sustained.

Same—Inconsistent Grounds—Right to Rely on Defendant's Testimony—Estoppel.—In an action for injuries to a passenger on a street car, plaintiff's testimony was to the effect that the car had stopped, and was started before the passenger was given sufficient time to alight. Defendant's testimony was that the passenger attempted to alight before the car had stopped. Held, that plaintiff could not rely on defendant's testimony to make out a case under an ordinance prohibiting conductors to permit passengers to alight from a moving car, as, in order to do so, he would have to repudiate his own testimony, and the allegations of the petition on which such testimony was based.

Same—Duty to Give Time to Alight.*—A street car conductor has no right to start his car while he sees or should see a passenger in the act of alighting, although the passenger has already had ample time to alight, and has been unduly slow in so doing.

Instructions.—A charge submitting an issue of negligence not raised by the evidence is erroneous.

Same—Appeal—Estoppel.—Where a party has unavailingly done all that he can do to prevent the submission of a question to the jury, and the question is submitted under instructions asked by his adversary, the fact that he asks instructions presenting the question in a favorable aspect to himself does not estop him on appeal to assert that the question should not have been submitted at all.

Injury to Street Car Passenger—Contributory Negligence—Alighting from Moving Car—Instructions.†—In an action for injuries to a passenger on a street car, the only theory on which plaintiff was entitled to recover under her pleadings and evidence was that the car had stopped, and was negligently started while the passenger was attempting to alight. Defendant's testimony was that the passenger attempted to alight from the car while it was moving, in disregard of a warning from the conductor. Defendant requested a charge that

*See foot-notes appended to *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; foot-note appended to *Meade v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 13, 34 Am. & Eng. R. Cas., N. S., 13; *Rutledge v. New Orleans & N. E. R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488.

†As to whether it is contributory negligence for a passenger to alight from a moving car, see foot-note appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; foot-note appended to *Knoxville Traction Co. v. Carroll* (Tenn.), 13 R. R. R. 707, 36 Am. & Eng. R. Cas., N. S., 707; *McDonald v. City Elec. Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

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plaintiff could not recover if the passenger's injury was caused by her act in stepping from the car while in motion. The court modified the request by adding thereto the words "after being warned by the conductor not to do so." Held that, while the instruction as modified was proper, yet, as there could be no recovery, under defendant's evidence, regardless of the question of warning or no warning, the refusal to give the requests as asked was error.

Instructions—Inconsistent Theories.—The presentation of two inconsistent theories of plaintiff's case to the jury, on one of which he was entitled to recover, and on the other of which he could not recover without a disregard of all the evidence introduced by him, was reversible error.

Death—Actions—Survival.—The right of action given by Rev. St. 1899, § 2864, for death by wrongful act, survives to the administrator of the party in whose favor it accrues.

Appeal from Circuit Court, Lincoln County; E. M. Hughes, Judge.

Action by John T. Behen against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehman, Geo. W. Easley, and Martin & Woolfolk, for appellant.

A. R. Taylor, for respondent.

VALLIANT, J. Plaintiff's mother was a passenger on one of defendant's street cars, and fell while attempting to alight therefrom, and received injuries from which she soon afterwards died. The plaintiff was the only child of deceased, who was his only parent living, and was a minor. The suit was brought in the name of the minor, by his guardian and curator, to receive damages, under the statute, on the ground that the accident was caused by the negligence of defendant. It was begun in the circuit court of the city of St. Louis, and taken by change of venue, on the application of defendant, to Lincoln county, where it was tried, with the result that there was a judgment for the plaintiff for \$5,000, from which the defendant appealed. After the appeal was taken, the plaintiff died, and the cause was revived in the name of the administrator of his estate.

There are two acts alleged as negligence on the part of the defendant: First, that, when the car reached the destination of plaintiff's mother, it stopped, in compliance with a signal given by her or some other passenger, to enable her to alight, and that while she was in the act of alighting, before she had a reasonable time to alight, the car was negligently caused to start forward, and she was thereby thrown to the ground, and received the injuries of which she died; second, that at that time there was an ordinance of the city to the effect that conductors of street cars should not allow women or children to enter or leave a car while the same was in motion, but that, in violation of that ordinance, the conductor of this car did allow the plaintiff's mother to leave it while it was in motion, and thereby "directly contributed to cause the injury and death of the plaintiff's

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mother." The answer was a general denial, and a plea that the plaintiff's mother was guilty of negligence which contributed to the accident, in this: that she negligently attempted to alight from the car while it was yet in motion, and before it had stopped, and got off backwards, and, in doing so, negligently disregarded the warning given her by the conductor not to alight from the car until it stopped. The reply was a general denial.

At the beginning of the trial, defendant moved the court to require the plaintiff to elect upon which of the two alleged acts of negligence he would stand, on the ground that they were inconsistent, and could not both be true. The motion was overruled, and exception taken.

The evidence for the plaintiff tended to prove that the deceased took passage on defendant's car at Forest Park to go east to Grand avenue. It was an evening in June, and it was a summer car, the seats running horizontally across the car; and the means of ingress and egress were running boards, or foot boards, one on each outer side, full length of the car. Finney avenue runs from west to east, having its east terminus at Grand avenue. The course of the car was from the west through Finney into Grand avenue, where the tracks turn south. The usual stopping place to discharge passengers is just after the car passes through the curve into the tangent. When this car was approaching that point a signal was given the conductor to stop, he gave the signal to the motorman, and the car stopped at the usual point. When it stopped, several passengers got off, and, among them, the plaintiff's mother arose and stepped on the running board, in the act to alight, and was doing so; but, before she had a reasonable time to alight, and while she was yet on the running board, the conductor gave the motorman the signal to start, the car started, the movement threw the plaintiff's mother to the ground, and she received injuries from which she died. At the close of the plaintiff's case the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exception was taken.

On the part of the defendant the testimony tended to prove that the car had not stopped when the deceased attempted to alight, but, while it was slowing down to stop, the deceased arose and stepped down upon the running board, in the act of alighting, her face to the rear, and the conductor saw her, and called to her, saying, "Don't step off there now, lady; wait until the car stops," but she disregarded the warning, stepped off backwards—that is, her back to the front of the car—and, in doing so, fell, and suffered the injuries mentioned.

The giving and refusing of instructions are assigned as error, and they will be noticed hereinafter.

1. The court ought to have sustained the motion of defendant to require the plaintiff to elect which of the two allegations of negligence he would stand upon, viz., first, that the car stopped,

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and while it was so the deceased stepped on the running board in the act of alighting, when the car was negligently suffered to start, and by that movement she was thrown to the ground; second, that the conductor allowed her to get off while the car was in motion. Those two allegations are inconsistent. If she was attempting to alight while the car was stationary, and was thrown down by its sudden starting, then she was not attempting to alight while the car was moving. Men get on and off the cars while they are going, and the ordinance does not make it the duty of the conductor to attempt to control them in that respect; but it seems to contemplate that women and children are more liable to accidents in attempting such a feat, and that conductors should not allow them to attempt it. Just how much restraint a conductor, under this ordinance, would be authorized to exert in case a grown woman should insist on using her own judgment in such emergency, it is unnecessary now to say. Plaintiff's theory is that, since the conductor gave the signal, and thereby caused the car to move while the woman was in the act of alighting, he thereby allowed her to leave the car while it was in motion, within the meaning of the ordinance, and in that view the two allegations of negligence might both be true. To allow an act to be done is to suffer or permit some one who wants to do it to do so. It is acquiescence in the purpose of another. If a conductor, while his car is in full speed, should, with force and arms, seize a woman and throw her from the car, that would not be his allowing her to alight from a moving car. Nor with any more reason could it be said that, because he caused her to be thrown to the street by suddenly starting the car while she was on the running board, in the act of alighting, he thereby allowed her to leave the car while it was in motion. The ordinance contemplates interference by the conductor when a woman or a child is indicating an intention to do the dangerous act of boarding or leaving a car while it is in motion. Action indicative of such an intention is essential before the conductor can be expected to know that such intention exists. It is therefore the action of the passenger which shows whether she was designing to alight from a car that was stationary, or from one that was moving, and the action which proves the one disproves the other. These two acts are not pleaded alternatively in the petition in this case, as may sometimes be done, under section 626, Rev. St. 1899, but it is stated that both are true—that the deceased was getting off while the car was standing, and that the conductor allowed her to get off while it was moving. Both cannot be true.

2. If, however, it should be conceded that the plaintiff had a right to prove, as an act of negligence, that the conductor violated the ordinance in question, there was no evidence tending to establish the fact that he allowed the deceased to leave or to attempt to leave the car while it was in motion. The plaintiff's evidence was that she did not attempt to get off until the car

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stopped, and the petition so stated. The only evidence tending to show that she was trying to get off while it was moving is that introduced on the part of the defendant, and it was to the effect that as soon as her act indicated such an intention the conductor called to her to wait until the car stopped. It does not appear that he was close enough to lay hands on her to restrain her by force, even if he had had a right to do so; but, when he warned her to wait until the car should come to a stop, her act in disregard of the warning cannot be said to have been with his acquiescence or permission. Whilst it is true that a plaintiff's case is sometimes made out or aided by the defendant's evidence, and also that a jury may believe part of a witness' testimony and disbelieve another part, yet, before the plaintiff in this case can avail himself of the defendant's testimony to the effect that the deceased was attempting to leave the car while it was moving, he will have to confess that all of the evidence adduced in his behalf was untrue, and that the statement in his petition that the car had stopped and was standing still when the attempt to alight was made was also untrue, and that only that part of the defendant's testimony that suited the plaintiff's case was worthy of belief. A party will not be allowed to take such a position.

3. The court did not err in refusing the instruction in the nature of a demurrer to the evidence. There was substantial evidence that the car stopped; that several passengers, who were quicker in their movements than the deceased was, alighted safely, and she was in the act of doing so, and had reached the running board, and the indications were that she would have landed safely, but the conductor, who was in a position where he must have seen her, gave the signal to go, and the car started, and by that movement she was thrown to the ground. The argument for defendant is made—that, even taking the plaintiff's evidence as true, the car stopped long enough for others to get off; that the deceased was so conveniently seated in the car that, if she had exercised reasonable care, she could have alighted as soon as others did, and therefore the car did stop a reasonable length of time. But if the conductor was doing his duty, he would have seen the woman when she was on the running board, if the plaintiff's testimony is true; and he had no right to start the car while he saw her in that position, even if she took longer time to alight than she should have taken.

4. The instructions, as is usual in such cases, are quite voluminous, and therefore we will not copy all of them herein, but only those criticised.

In the third instruction given at the request of the plaintiff, the jury are told that it was the duty of the conductor "to use reasonable care to prevent plaintiff's mother from leaving the car whilst it was in motion." That was wrong, because, as we have seen, even if that was a legitimate charge of negligence, there was no evidence to sustain it. We see no other error in the instructions given at the request of the plaintiff.

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An instruction was given at the request of the defendant referring to this ordinance, and saying, in effect, that, even though the conductor saw the plaintiff's mother preparing to leave the car while it was in motion, he was not required to forcibly restrain her, but it was sufficient if he warned her not to so do. As a general rule, a party will not be heard to complain of the submission of a question to the jury which ought not to have been submitted if it is submitted in an instruction asked by himself. But when a party has done—as this defendant did—all that he could do to prevent the submission of the question, and his efforts have been unavailing, and the question is submitted under instructions asked by his adversary, the fact that he asks instructions presenting the question in a favorable aspect to himself will not estop him from saying in the appellate court that the question should not have been submitted at all.

The defendant requested the following instructions, which the court refused:

“(7) The court instructs the jury that if you believe from the evidence in the case that, after Margaret Austin had safely boarded defendant's car and obtained a seat therein, she did, while said car was still in motion, and before it reached the regular stopping place for leaving and taking passengers at the point of her destination, to wit, Grand and Finney avenues, in the city of St. Louis, leave her seat, and walk off of said car, and step down on the running board of said car, and stepped from the running board of said car onto the street, whereby she sustained the injuries complained of, then the plaintiff cannot recover in this suit, and your verdict must be for the defendant.

“(8) The act of negligence stated in the plaintiff's petition is denied in the answer of defendant. The defendant further pleads in said answer that the deceased's death was caused by her own negligence in stepping off of defendant's car while the same was in motion. If, therefore, you find from the evidence that deceased's death was not caused by a start of the car, but by her act in stepping off of the defendant's car while the same was in motion, then plaintiff is not entitled to recover, and your verdict must be for the defendant.

“(9) The court instructs the jury that, under the pleadings and the evidence in the case, the plaintiff is not entitled to recover, and your verdict must be for the defendant.

“(10) The court instructs the jury that, under the pleadings and the evidence in this case, the plaintiff is not entitled to recover upon the charge of the petition that the defendant's conductor, in violation of an ordinance of the city of St. Louis, permitted the deceased, Margaret Austin, to alight from a moving car.”

“(13) The court instructs the jury that if they find and believe from the evidence that the deceased's death was caused in any other manner than by the motion of the car, in starting forward from a standing position, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.”

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The court modified instructions 7 and 8 by inserting in No. 7, after the word "street," the words "after having been warned by the conductor not to leave the car till it stopped," and in No. 8, after the second word "motion," the words "after being warned by the conductor not to do so." It was not error in the court to give those instructions with those modifications, because, if the plaintiff's mother attempted to get off the car before it stopped, and after the conductor had warned her not to do so, and if her attempting to get off under those circumstances was the cause of the accident, then the defendant was not liable. But whilst the defendant was not liable under the hypothesis set out in the modified instructions, it was also not liable under the facts propounded in the instructions as asked. Under the plaintiff's pleading and evidence, he was entitled to recover only if the facts were that the car stopped, and while it was stationary the plaintiff's mother attempted to alight, and while she was in the act of alighting the car was negligently put into motion, and that motion threw her to the ground. If the facts were that the car had not stopped, and if she attempted to alight from it while it was moving, and fell in that attempt, the plaintiff is not entitled to recover, even though the conductor did not give her warning, because that is not the case made in the plaintiff's pleading or proof. Therefore, whilst it was not error to give the instructions as modified, it was error to refuse them as asked. They might have been given in both form with propriety.

Instruction 9, which was a demurrer to the evidence, was properly refused, as has already been said.

Instruction 10, which was aimed to take the question of negligence under the city ordinance from the jury, should have been given, for the reasons above stated.

From what has already been said, it follows that instruction No. 13 should have been given.

The effect of the giving of the instructions as given, and the refusing of those refused, was to submit two inconsistent theories to the jury, and to authorize them to find for the plaintiff on either one; that is, if the deceased was attempting to leave the car after it had stopped to allow her to alight, and she was thrown to the ground by its sudden start, or if she was attempting to leave the car before it stopped, and had fallen because of its moving. Under those instructions the jury was authorized to render a verdict for the plaintiff even if they discredited all the evidence offered by him, and in spite of the allegations in his petition. That was a serious error, for which the judgment must be reversed.

5. A question now arises which has not before been decided by this court. The plaintiff having died while this appeal has been pending, and the judgment being reversed, does the cause of action survive? Under the evidence in the case, if the plaintiff were living, he would be entitled to have the cause remanded for a new trial. A cause of action for personal injuries suffered

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by the plaintiff through the negligence of the defendant is an action in delicto, which ceases by the death of either the plaintiff or the wrongdoer. *Davis v. Morgan*, 97 Mo. 79, 10 S. W. 881; 1 Cyc. p. 50. But when judgment is obtained in the lifetime of the plaintiff, the cause of action is then merged in the judgment, and becomes a debt by judgment, and upon the plaintiff's death the debt survives to his administrator; but, if on appeal the judgment is set aside and vacated, the claim then is restored to its original nature—a cause of action arising out of a tort, which does not survive to the administrator. *Crawford v. R. R.*, 171 Mo. 68, 66 S. W. 350. But now we have, not an action for injuries to the plaintiff's person, nor an action to recover for the mental and physical suffering of his mother, but an action for compensation for what he lost by his mother's death. The action arises, not under the common law, but under our statute (section 2864, Rev. St. 1899), which is mainly copied from the English statute 9 & 10 Vict. c. 93, commonly called "Lord Campbell's Act." In *Steward v. Vera Cruz*, 10 L. R. 59, the question was, did the Court of Admiralty, under the statute which gave it "jurisdiction over any claim for damages done by any ship," have jurisdiction of a claim arising under Lord Campbell's act; and it was held by the House of Lords that it had not. The language of the opinions in that case have especial reference to the law governing proceedings in rem in admiralty, but the nature of the action given in Lord Campbell's act was discussed in that connection, and it was held that act created a new action, and did not merely remove a restriction from the action given by the common law. It is there said (*loc. cit.* 67): "Lord Campbell's act gives a new cause of action, clearly, and does not merely remove the operation of the maxim, 'Actio personalis moritur cum persona,' because the action is given, in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing, in point of form, in the name of the executor." In 4 *Southerland on Damages* (3d Ed.) § 1260, the author, discussing statute, "The death of a person entitled to sue pending the suit neither abates the action, in the common-law sense, nor is the cause of action to be compensated for discharged, but in such case the damages which may be recovered will be limited in duration to the extent of the lifetime of such person." In support of the text the author cites *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633, and *Meeking v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635, both of which sustain the text. The argument in both those cases is to the effect that the statute gives a right of action to recover the pecuniary loss that the plaintiff has sustained in the death of the person killed. The arguments in both cases would apply more literally to a case arising under the next succeeding sections of our damage act than to one arising, as does this case, under section

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2864, because under this section the damages are fixed at \$5,000, whilst in the next sections "the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." But although the statute fixes the amount of damages in the one section, and leaves it to be fixed by the jury in the other, there is no difference in the principle involved. In both cases the damages are given as compensation to the plaintiff for his pecuniary loss in the death of the person killed, not for the suffering of that person. The New Jersey court in the case above cited said (*loc. cit.* pages 565, 566, of 63 N. J. Law, page 636 of 44 Atl.): "If the death of the beneficiary before the end of the litigation discharges the liability of the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation, and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law, of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer, incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending the suit, there was neither an abatement of the action, in the common-law sense, nor was the cause of action to be compensated for discharged." The reasoning of the New York court was along the same line, and in both courts the decisions were unanimous. We are of the opinion that the right of action in this case, on the death of the plaintiff, survived to his administrator.

The judgment is reversed, and the cause remanded to the circuit court, to be retried according to the law as herein expressed.

BRACE, P. J., concurs. MARSHALL, J., concurs in all except paragraph 5. ROBINSON, J., absent.

BARRINGER v. ST. LOUIS, I. M. & S. Ry. Co.

(Supreme Court of Arkansas, Jan. 14, 1905.)

[85 S. W. Rep. 94.]

Injury to Passenger—Duty to Alighting Passenger.*—In an action against a carrier for injuries to a passenger by the starting of the train while he was alighting, an instruction that it was the duty of the carrier to stop the train a sufficient time to permit passengers to leave the car with safety was properly modified by changing the word "sufficient" to "reasonable."

Same—Same.*—It is the duty of a carrier to allow a passenger a reasonable opportunity for getting off a train, and a reasonable time is such as one of ordinary care, under the circumstances, should be allowed to take.

Same—Prima Facie Case—Burden of Proof—Statute.—Under Kirby's Dig. § 6773, providing that all railroads shall be responsible for damages to persons and property by the running of trains, where a passenger is injured while alighting from a train, owing to the starting thereof, it is not incumbent on him to show by a preponderance of the evidence that the injuries were caused by the carrier's negligence; the injury making a prima facie case of negligence.

Same—Contributory Negligence.†—In an action for injuries to a passenger on alighting from a train, evidence held to warrant a finding that he was guilty of contributory negligence.

Duty to Alighting Passenger—Effect of Intoxication—Instructions.‡—In an action for injuries to a passenger while alighting from a train, owing to the carrier starting the train, the court instructed, for defendant, that the law does not require a railroad conductor, before starting his train, to find out that all passengers desirous of getting off have done so, but only to stop a reasonable length of time. At the request of plaintiff, the court instructed that a railroad company should stop a train long enough for passengers to alight with diligence, and that if plaintiff attempted to leave the train with reasonable dispatch, and defendant's servants knew that he had not alighted, but started the train while he was alighting, it was negligence, and that, if plaintiff was under the influence of liquor, it would not relieve defendant from reasonable care, and that, if his condition was known to defendant, it was defendant's duty to have been more careful to avoid injuring him. Held, that there was no error in the instructions given for defendant, when considered in connection with the instructions given at the instance of plaintiff.

*See foot-note appended to McDonald v. City Electric Ry. Co. (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; Southern Ry. Co. v. Bandy (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; Rutledge v. New Orleans & N. E. R. Co. (C. C. A.), 11 R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488.

†As to whether it is contributory negligence for a passenger to alight from a moving car, see foot-note appended to Newcomb v. New York Cent., etc., R. Co. (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; foot-notes appended to McDonald v. City Elec. Ry. Co. (Mich.), 1 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; foot-notes appended to Feldschneider v. Chicago, etc., Ry. Co. (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; foot-note appended to Paganini v. North Jersey St. Ry. Co. (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14; Simmons v. Seaboard Air Line Ry. (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454.

‡As to the duties and liabilities of the carrier with respect to passengers or prospective passengers, see foot-notes appended to Tuttle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.), 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333.

Barringer v. St. Louis, etc., Ry. Co

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by John A. Barringer against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The complaint alleges that appellant took passage on one of appellee's passenger trains at Camden, Ark., for Whelen, Ark., on the 25th day of December, 1900; that the train was late, and crowded with passengers, and, when it arrived at Whelen, appellant promptly attempted to leave the train, but the appellee negligently failed to stop its train long enough to permit him to alight, and, while appellant was in the act of alighting, negligently started the train with a sudden jerk, without notice to appellant, whereby he was thrown under the wheels, and his legs so badly injured that amputation became necessary. The damage was laid at the sum of \$10,000, etc. The answer denied the material allegations of the complaint and pleaded contributory negligence, and the case was tried before a jury, and a verdict rendered for the defendant.

The plaintiff testified: "I live near Whelen. Last Christmas Day I went to Camden, and came back on the train. The same day I had four quarts of whisky. I got out when the train got to Whelen. I do not suppose I went at breakneck speed as I came cut on the steps. I might have stopped a very short time. When I got down, the train was just about moving—already moving. Just as I hit the platform the gravel ran out from under me, and I tried to regain my position, but failed to do so. I had not been on the ground before. I spoke to the brakeman, and said something to him about putting me off at the mill. I did not see the conductor there. I was sitting, I suppose, on the third or fourth seat from the rear end of the car. When the train got to Whelen I got up and came right out of the car—not in a great rush, but about as I usually get off a train. When I stepped off, the train, likely, had not moved a foot. The train usually consisted of three coaches. It started off right fast that day. I fell, and the car wheel cut my leg off," etc. Cross-examination: "I don't think I got up before the train stopped. I suppose I stopped at the door two or three seconds, and spoke to the brakeman. The train started to move as I stepped from the platform, and my foot rolled on the gravel. I do not suppose I would have fallen if my foot had not rolled on the gravel, nor if the train had not been moving. I did not see the conductor. I saw no signal to start, and did not hear the brakeman hollo "All aboard." The train was not in motion when I started down the steps, but got in motion just as I went to step off. I had taken three drinks that day—one in Camden and two on the train." There was other witnesses for appellant, but none made the case any stronger for him than his own testimony. The testimony for appellee, by several witnesses, tended to show that appellant got off the train on the ground, and was entirely away from the train, but when he started

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he caught the handle bars, and attempted to get on again; that he was under the influence of liquor, and lost his footing, falling under the car, and receiving the injury complained of.

W. F. Osborne and McRae & Thompkins, for appellant.
B. S. Johnson, for appellee.

WOOD, J. (after stating the facts). The court modified appellant's first and second prayers* by changing the word "sufficient" to the word "reasonable," to which appellant objected. There was no error in the modification. A "sufficient" time, where the passenger acts with reasonable diligence, is but tantamount to giving the passenger a "reasonable" opportunity to alight. So we do not regard the modification as very material. But the law is that it is the duty of carriers to allow their passengers a reasonable opportunity for getting on and off their trains, and they must stop at stations long enough for that purpose. *Ry. v. Person*, 49 Ark. 188, 4 S. W. 755; *Ry. v. Tankersley*, 54 Ark. 28, 14 S. W. 1099; *Ry. v. Lawton*, 55 Ark. 429, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; *Van Cleve v. Ry.* (Mo. App.) 80 S. W. 707; *Keller v. S. City Ry.*, 27 Minn. 178, 6 N. W. 486; *Davis v. C. Ry.*, 18 Wis. 175; 4 Elliott, R. R. §§ 1591, 1628. A reasonable time is such time as a person of ordinary care and prudence, under the circumstances, should be allowed to take. *Imhoff v. C. Ry. Co.*, 20 Wis. 344. It is the duty of the carrier, in determining what is a reasonable time, to take into consideration any special condition peculiar to any passenger and to the surroundings at the station, and to give a reasonable time, under the existing circumstances, as they are known or should be

*Plaintiff's first prayer was as follows: "You are instructed that carriers of passengers by steam are held to a high degree of care, and are responsible for a very small degree of negligence. They are bound to use ordinary prudence, caution, and foresight to avoid injury to passengers; to provide safe and convenient means of ingress and egress to and from their cars; to stop at stations; and to remain stopped a sufficient length of time to permit passengers to leave the cars with safety. When the trains have stopped, and before the passengers have had time to alight, it is their duty to give the passengers notice in some manner of all moves of the train; and if the jury find from the evidence in this case that the defendant has failed in its duty in either of these respects while the plaintiff was a passenger on its train, whereby he was injured, and that this failure was the cause of the injury, your verdict should be for the plaintiff." His second prayer was as follows: "You are instructed that it is the duty of a railroad company to stop its trains at the stations where passengers are to debark a sufficient length of time, and to hold them still long enough, for them to alight with safety, and that it is the duty of the passengers to leave the train with reasonable diligence after it has stopped. It is negligence for the carrier to start the train after it has stopped, and before passengers have had time to alight. So, in this case, if you believe from the evidence that on the arrival of the train at Whelen the plaintiff attempted, with reasonable diligence, to alight, and that while in the act of leaving the train it was started before plaintiff had time to alight, and that this was the proximate cause of the injury, your verdict should be for the plaintiff."

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known by its servants, for a passenger to get on or off its train. 6 Cyc. 613.

There was no error in instructions numbered 3 and 4 given at request of appellee, when considered in connection with instructions numbered 3 and 6 given at instance of appellant.*

The first instruction at the request of appellee put the burden upon plaintiff, after establishing that his injuries were caused by the operation of appellee's train, to show by a preponderance of evidence that such injuries were caused by appellee's negligence. This was error, under the decisions of this court in *Ry. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Ry. v. Taylor* (Ark.) 20 S. W. 1083; *Tilley v. Ry.*, 49 Ark. 535, 6 S. W. 8; *Ry. v. Neely*, 63 Ark. 640, 40 S. W. 130, 37 L. R. A. 616; *Ry. v. Blewitt*, 65 Ark. 235, 45 S. W. 548; *Ry. v. Daniels*, 68 Ark. 171, 56 S. W. 874; *Ry. v. Cooksey*, 70 Ark. 481, 69 S. W. 259. The long-established doctrine in this state under section 6773 of Kirby's Digest, is that, where an injury is caused by the operation of a railway train, a prima facie case of negligence is made against the company operating such train. Cases supra. The error in giving this instruction must cause a reversal unless the uncontroverted proof shows that appellant was guilty of contributory negligence.

The appellant had four quarts of whisky. He says he had taken three drinks, and the other proof shows that he was under the influence of liquor. The appellant says that the train was not in motion when he started down the steps, but got in motion just as he went to get off. He says it started off right fast, but that the train likely had not moved a foot when he stepped off. He says, "I suppose I stopped at the door two or three seconds,

*Instruction No. 3 given at the request of defendant was as follows: "The court charges the jury that the law does not require a railroad conductor, before starting his train, to find out that all passengers desirous of getting off have gotten off, but he is only required to stop his train a reasonable length of time to allow passengers to get off, and when that time has elapsed he has a perfect right to set his train again in motion." Instruction No. 4 given at defendant's request was as follows: "The court instructs the jury that a 'reasonable time to alight,' as used in the instructions, is such time as is usually required for passengers to get on and off trains at that station in safety."

Instruction No. 3 given at the request of plaintiff was as follows: "You are instructed that it is the duty of a railroad company, when it stops at a station, to remain still long enough for passengers to alight with reasonable diligence. And in this case, if you believe from the evidence that, when the station was reached, that the plaintiff attempted to leave the train with reasonable dispatch, and that defendant's servants knew that he had not alighted, but started the train, without notice to him, while he was in the act of alighting, and that such starting of the train was the cause of the injury, your verdict should be for the plaintiff." Instruction No. 6 given at the request of plaintiff was as follows: "You are further instructed that, if you believe that plaintiff was under the influence of liquor, this would not relieve the defendant from the exercise of reasonable care to avoid injuring him, but, if his condition was known to the defendant's employees, it was then their duty to have been more careful to avoid injuring him, if you find that his condition was such that it made it apparent that he needed such attention."

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and spoke to the brakeman." It is thus shown by the appellant himself that he stopped at the door as he passed out. How long he stopped is a matter of opinion with him. Another witness testified that Barringer stopped on the steps "three or four seconds." This was also an estimate. But one of appellant's witnesses (Stiffner) details facts which show conclusively that appellant had ample time to debark before the train started, had he moved with reasonable expedition. This witness testified that he saw appellant come out of the cars and down the steps, and, while appellant was on a level with the crowd, standing on the ground or on the bottom step, he saw one Carey, who was also a passenger, assist Mrs. Young and her two children and her bundles on the train. Carey says that the train started up after he had taken this lady and her two children and seated them on the forward car, and after he had put down the bundles and started out. The testimony of Mrs. Young, the lady who was assisted on the train, shows that appellant was on the steps as she got on. The uncontroverted proof, then, is that appellant stopped at the door of the car or on the steps, before stepping off, long enough for a passenger to alight from the train himself and assist a lady friend with two small children onto the train; to take them and their bundles into the forward car, put down the bundles, and start out before the train started. If three passengers—a lady and two small children—had time to get aboard the train and walk to the forward car with their bundles, and get seated, before the train started, certainly appellant, who was at the door or on the steps, and had nothing to do but to step off, had reasonable time to do so. Appellant's own evidence shows that the train had just commenced to move, and had only moved about one foot, when he stepped off. He charges in his complaint that appellee negligently started up its train with a sudden jerk, throwing him under the wheels, but his own evidence fails to show this, nor is there any evidence to show negligence in the manner of starting the train. His fall, he says, was caused, he supposed, by the train moving and his foot rolling on the gravel; but there is no evidence that the train was started with a sudden lurch, throwing appellant to the ground. True, appellant supposes that he only stopped two or three seconds, and another witness says he stopped three or four seconds. But the evidence of what was actually done by others during that time shows that it was ample to afford appellant an opportunity to debark in safety. This leaves out of view entirely the testimony of several witnesses who say they saw appellant, after the train had stopped, on the ground, and that he attempted to board the car after it had started. Appellant had no baggage or other obstructions to impede his progress, except the whisky. The jury doubtless came to the conclusion that this was too much for him, and brought on all his trouble.

Affirm.

CODY *v.* DULUTH ST. RY. CO. *et al.*

(Supreme Court of Minnesota, Dec. 30, 1904.)

[102 N. W. Rep. 397.]

Injury to Passenger — Contributory Negligence — Alighting from Moving Car.*—In an action against a street railway for injuries to a passenger, a request to charge that, if plaintiff jumped or stepped off the car while in motion, she could not recover, was properly refused, because it was indefinite as to the speed of the car on which the question of negligence in stepping therefrom would depend.

Instructions.—A complaint charged negligence in that the car, having stopped to permit plaintiff to alight, was suddenly started, and plaintiff was thrown to the ground. Defendant attempted to show that plaintiff was guilty of contributory negligence in alighting before the car had come to a stop. The court, in its charge, defined the general duties of defendant as a common carrier, defined contributory negligence, and then stated that there were two controlling issues in the case: First, was defendant negligent, and were the injuries proximately caused by such negligence? Second, was plaintiff negligent, and did her negligence proximately cause or contribute to her injury? After charging on the first phase of the case, the court stated that with reference to plaintiff's negligence the jury should consider where the car was when plaintiff arose from her seat, whether it was moving, and, if so, at what speed, and then continued that, if plaintiff got off the moving car, the question whether or not a person of ordinary care would have jumped off the steps of the car under the same circumstances under which plaintiff was placed was a question of fact for the jury. Held, that the concluding clause of the charge did not, when considered with the entire charge, and especially with that portion directed to contributory negligence, inject a question not litigated into the case, and was not necessarily misleading.

Same—Duty of Counsel.—Where a charge is otherwise clear and distinct on the issues submitted at the trial, language susceptible of a construction in conflict therewith must be called to the attention of the court by counsel if he deems it misleading.

On reargument. Judgment below affirmed.

For former opinion, see 102 N. W. 201.

PER CURIAM. A re-examination of this case upon reargument convinces us that the court misapprehended the force and effect of the instruction which was the basis of reversal in the decision heretofore filed. The specific ground of a negligence charged in the complaint was that the car upon which plaintiff was riding stopped for the purpose of allowing plaintiff to get off, and while she was in the act of going down the steps defendant negligently and suddenly started the car with a jerk, thereby throwing plaintiff to the ground. Defendant attempted to prove that plaintiff stepped off the car before it had come to a stop, and was thus guilty of contributory negligence. This line of defense is shown clearly by the cross-examination of plaintiff and by the testimony of several witnesses called on the part of the defendant. Defendant excepted to the following language, used by the court in the course of the charge to the

*See preceding case and foot-notes.

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jury: "If the car was moving when plaintiff left her seat, and went down on the steps of the car, whether or not she was advised not to get off, and, if she did get off the moving car, whether or not a person of ordinary care and prudence, under the same circumstances under which she was placed, would have jumped or stepped off the steps of the car, these are all questions of fact for you, the jury, to determine, and I invite your attention to the evidence, and all of the evidence in determining these questions." The previous decision was based upon the ground that the effect of this part of the instructions was to inject a new issue in the case, not presented by the pleadings, and not litigated at the trial, and in effect left the jury to infer that they might find a verdict for plaintiff, although the car was in motion at the time she attempted to alight, provided she used ordinary care in so doing. The court fell into error in this respect by failing to consider the nature of the evidence bearing upon the question of contributory negligence, and in not sufficiently comprehending the general charge of the court upon that question. From a re-examination of the record it clearly appears that plaintiff did not assume an inconsistent attitude at the trial, or attempt to recover upon any other ground than the one set forth in the complaint; but the defense of contributory negligence was vigorously interposed, and made a very prominent issue in the case. It was proper, therefore, for the court to set before the jury the issues which had been presented at the trial, and the question was thus set forth in the first part of the general charge: "And the question arising from these allegations of the complaint, which the jury must determine from the evidence in the case, is, did defendant so negligently and carelessly start the car with a jerk that plaintiff was thrown from the step onto the ground, whereby she received the injuries complained of?" The court then set out in detail the duties of defendant as a common carrier, for hire, of passengers; the management and control of its cars; the duty to stop a sufficient length of time to permit passengers to get on and off; and then stated that defendant claimed plaintiff was injured by her own negligence, and, if plaintiff's negligence contributed to her injuries, then she could not recover. The court then defined contributory negligence as applicable to plaintiff in this case, and in recapitulating this question said there were two controlling questions for the jury: First. Was defendant negligent, as charged in the complaint, and were plaintiff's injuries proximately caused by such negligence? Second. Was plaintiff negligent, and did her negligence proximately cause or contribute to her injuries? The court further stated that the jury should consider the respective claims of the parties in the light of the evidence, and in considering the first question to determine whether, in the exercise of due care, defendant, after stopping at the crossing, and after plaintiff was on the steps of the car, allowed her a reasonable time to alight, and, if not, then it was guilty of negligence. But, on the other hand, in relation

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to the second question: "Was plaintiff negligent, and did her negligence cause or contribute to the injuries she received, and of which she complained? It is your duty to consider and determine from the evidence where the car was when plaintiff arose from her seat in the car; whether or not it was then moving, and, if so, at what speed it was moving; whether it was moving when plaintiff entered the vestibule and went out upon the car steps; the speed at which the car was moving, as the evidence discloses it." Following this quotation appears that portion of the charge previously set out, and which was excepted to by appellant. Defendant requested the court to instruct the jury that, if plaintiff jumped or stepped off the car while in motion, she could not recover. This particular request was properly refused, because indefinite as to the speed of the car. Negligence on her part would depend on the speed at which the car was going. But it was proper for the court to submit to the jury the question of contributory negligence, defendant having tried the case upon that line of defense. While that portion of the charge excepted to, when considered by itself, would seem to inject into the case a question not litigated, yet, when considered with the entire charge, and especially with that portion directed to contributory negligence, it is not necessarily misleading, and is not fairly open to the objection made to it. The court, by using this language, is not addressing the jury upon the question of defendant's negligence, but is speaking wholly upon the question of plaintiff's negligence; and defendant had introduced testimony tending to show that the car was moving when plaintiff left her seat and went on the steps, and that she was advised not to get off, but did get off, when the car was moving. It is true the court made the statement that it was a question of fact as to whether plaintiff exercised ordinary care and prudence while getting off the car when in motion; yet, when considered in connection with the proposition then being submitted to the jury, it cannot reasonably be held that it had the effect of confusing and diverting the minds of the jurors from the real question submitted. We think this part of the language excepted to comes within the rule that, if the charge is otherwise clear and distinct on the issues submitted at the trial, language susceptible of a construction in conflict therewith requires counsel to call the attention of the court thereto if it is deemed to be misleading. It is apparent, when considered in connection with the context, that the language referred to was not used for the purpose of denying the propositions of law then under consideration, and was not error.

We find no other error in the case, and, for the reasons stated, the former order of the court is revoked, and the order appealed from is affirmed.

BUTLER *et al.* v. TIFTON, T. & G. Ry. Co.

(Supreme Court of Georgia, Jan. 28, 1905.)

[49 S. E. Rep. 763.]

Stations—Right to Locate—Interests of Public.—The right of a railroad company to contract for the location and maintenance of stations may be restricted by the fact that the public has an interest in the times and places for stoppage of trains to receive and discharge freight and passengers.

Spur Tracks to Private Property—Right to Locate.*—There is no such restriction on the company's power to contract to build a spur track from its main line to a sawmill or other private enterprise.

Same—Validity of Contract.—The validity of such contract was recognized in *Tifton Co. v. Bedgood & Co.*, 43 S. E. 257, 116 Ga. 949, 951, and it was not error to overrule the demurrer.

Contracts.—Instead of reducing an agreement to writing, the parties, by reference, may adopt the terms of a contract already in writing.

Res Judicata.—A party must be held bound by the ruling which he invoked, and by a judgment in his favor which he procured.

Same.—If, in a pending suit, the plaintiff offers an amendment, and the defendant demurs thereto on the ground that "it sets up a new and distinct cause of action," and such demurrer is sustained, the judgment dismissing such suit will not bar the plaintiff from suing on the cause of action set out in the amendment offered, but disallowed for the reason that it was a new and distinct cause of action.

Same.—Such ruling on the demurrer further shows that the merits of the matter set out in the amendment were not and could not have been determined in the first suit.

Same.—It was error to sustain the plea of *res adjudicata*.
(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Action by J. L. Butler and others against the Tifton, Thomasville & Gulf Railway Company. From a judgment both parties bring error. Reversed.

Many of the facts involved in the present case are stated in 116 Ga. 945, 43 S. E. 257. While the record is voluminous, the following is a synopsis of what is material to an understanding of the points involved in the decision: The Union Lumber Company owned 1,617 acres of land in Colquitt county, the timber privileges on which it sold to Huber & Stokes. On October 24, 1899, this firm entered into a contract with the Tifton, Thomasville & Gulf Railway Company, by which, in consideration that they would locate their sawmill on the premises, and ship all the lumber cut from this land over the railway company's line, the latter agreed to build a side track to the sawmill, and to haul the timber therefrom at a rate as low as that charged other shippers.

*See *Beasley v. Texas & P. R. Co.* (U. S.), 11 R. R. R. 846, 34 Am. & Eng. R. Cas., N. S., 846; *Minneapolis, etc., R. Co. v. State of Minnesota* (U. S.), 10 R. R. R. 639, 33 Am. & Eng. R. Cas., N. S., 639; note appended to *State v. Kansas City, etc., Ry. Co.* (La.), 14 Am. & Eng. R. Cas., N. S., 461; extensive note appended to *Lyman v. Suburban R. Co.* (Ill.), 21 Am. & Eng. R. Cas., N. S., 828.

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On November 3, 1899, Huber & Stokes sold the timber and assigned this contract to Bedgood & Co. The latter, on April 21, 1902, brought an action against the railway company for damages for breach of the contract to build the side track. The company's demurrer to this petition was sustained by this court (116 Ga. 945, 43 S. E. 257) on the ground that the contract sued on was not assignable. On the return of the remittitur Bedgood & Co. offered an amendment to the petition setting up that a competitor of the defendant had a line of road near the timber described; that it was to the advantage of the defendant to enter into an agreement by which it would secure the freight from the sawmill, instead of allowing it to go over the other road; that for this reason the contract in reference to the side track was made; that prior to the purchase by Bedgood & Co. of the timber from Huber & Stokes, and before the payment of any purchase money therefor, Bedgood & Co. informed the officers of the railway company that they were negotiating to acquire the timber, and desired to know if the railway company would carry out the contract and put in the spur track if the plaintiffs should purchase the timber and have transferred to them the contract aforesaid; that the railway officials notified Bedgood & Co. that the railway company would carry out the contract with plaintiffs should plaintiffs purchase, and did then and there assent to the transfer of said contract to plaintiffs, and on this assent being given parted with \$7,550 in the acquisition of the timber rights aforesaid; that, in addition to the above-mentioned consideration, plaintiffs agreed, as a part of the trade, to assume and carry out the obligations of Huber & Stokes under the contract aforesaid; that plaintiffs were financially responsible, and the railway company agreed for the contract to be transferred to plaintiffs, and agreed and fully bound itself to carry out for plaintiffs all the terms of the contract as they had bound themselves to do with Huber & Stokes, and never denied its obligation until about the time of the filing of this suit; that about March 1, 1900, the railway company insisted under the contract upon plaintiffs giving to it the output of the mill, and again stated to plaintiffs that, if plaintiffs would haul the cut of the mill to the main line, then the railway company would hasten the construction of the spur track, and put it in at once, and to this end had their engineer mark out the line; that, though plaintiffs were not bound to ship said lumber over defendant's line until the completion of the spur track, yet, relying on the obligation aforesaid, they did, as requested by the railway company, ship the output of their mill over the road. To this amendment the defendant demurred upon several grounds; among others, that the amendment sought to add a new and distinct cause of action. After argument it was ordered and adjudged "that the amendment offered by plaintiffs to said declaration be disallowed on the ground that the same sets up a new and distinct cause of action." Thereupon, on July 21, 1903, Bedgood & Co. brought a new suit, containing, among other things, all the allegations set forth in the foregoing amend-

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ment, and alleging the items of damage, the extra expense of hauling lumber to the main line, aggregating \$6,511.91. To this second suit the railway company filed both a demurrer and a plea of res adjudicata. The demurrer was both general and special, and attacked the petition on many grounds; among others, that the contract was vague and indefinite, not assignable, without consideration, void under the statute of frauds, involved the title to land, of which the city court had no jurisdiction, contrary to public policy, being an undertaking by a quasi public corporation to perform an unlimited amount of work during an unlimited time. There were also many other grounds of special demurrer, which it is unnecessary to state in detail. The court overruled the demurrer, to which judgment the railway company, by cross-bill, excepted. The court sustained the plea of res adjudicata, to which was attached as an exhibit the original suit with the amendment and the judgment disallowing the amendment on the ground that it set up a new cause of action. To this judgment sustaining the plea of res adjudicata the plaintiffs excepted.

Shipp & Kline, for Butler and others.

J. L. Sweat, J. H. Merrill, and J. A. Wilkes, for railway company.

LAMAR, J. (after stating the foregoing facts). 1-3. The public has an interest in the location of depots and the time and place at which trains must stop for the reception of freight and passengers. A railroad company's power to contract in reference thereto is therefore not unrestricted, but public policy must be considered in determining the legality of such agreements. See the cases cited in 7 Rap. & Max, Rd. Dig. 201-204. But such limitation on its power to contract does not apply to a case where the railroad company covenants to build a spur track from its main line to a sawmill or other private enterprise. The interest of the public cannot in any way be seriously affected by the construction and maintenance of such track. *Austin v. Augusta Co.*, 108 Ga. 692, 693, 34 S. E. 852, 47 L. R. A. 755; *Graham v. R. Co.*, 120 Ga. 757, 49 S. E. 75 (3). Indeed, the validity of such contract was recognized in *Tifton Ry. Co. v. Bedgood*, 116 Ga. 949, 951, 43 S. E. 257. The allegations of the petition then under review were so nearly identical with those in the present case that it is unnecessary further to consider the question raised by the demurrer, which the court properly overruled.

4-6. In the case last cited this court held that, while the contract bound the railroad company to build a spur track for Huber & Stokes, it could not be assigned to Bedgood & Co., so as to give the latter a right of action for its breach. On the return of the remittitur the plaintiffs offered to amend the petition by alleging that they not only had an assignment from Huber & Stokes, but that the railway company assented to the assignment, and agreed that, if Bedgood & Co. would buy the land, build the

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mill, and ship the lumber over its lines, it would build the spur track. In other words, the amendment averred that there was an independent agreement between Bedgood & Co. and the railway company in reference to the building of the spur track. Instead of reducing this agreement to writing, however, the parties adopted terms which were already in writing, and by reference or otherwise parties can adopt the terms of a contract between others. *American Co. v. Continental Co.*, 188 U. S. 107, 23 Sup. Ct. 265, 47 L. Ed. 404; *International Co. v. Hardy*, 118 Ga. 512, 45 S. E. 311. Compare *Town of Douglasville v. Johns*, 62 Ga. 427 (3). The amendment therefore set out a cause of action. But the court held that it "set up a new and distinct cause of action"; that the original suit was on a contract between Huber & Stokes and the railway company, while the amendment sought to recover for an entirely different cause of action arising out of a contract between different parties. Yielding to that decision, Bedgood & Co. thereupon brought the present action, making therein most of the allegations contained in the amendment which had been thus disallowed by the court. To this the railway company filed a plea of *res adjudicata*, and upon the production of the record in the former suit the plea was sustained.

It is evident that Bedgood & Co. have not had a hearing on the merits, and that the matters set up in the present suit were not passed on in the former. Civ. Code 1895, §§ 5095, 3744. It is further evident that the facts set out in the present case could not "have been put in issue in the cause where the judgment was rendered." Civ. Code 1895, § 3742. For when Bedgood & Co. endeavored to secure a hearing on the new matter, they were prevented from so doing by the order sustaining the company's demurrer. Having secured a judgment sustaining their position, the railway company must be held bound by the ruling which it invoked, and by the judgment in its favor which it secured. *Brown v. State*, 109 Ga. 571, 34 S. E. 1031; *Papworth v. City*, 111 Ga. 55, 36 S. E. 311; *Neal Co. v. Chastain*, 121 Ga. —, 49 S. E. 618. The very terms of the record offered in support of the plea of *res adjudicata* show that "the new cause" could not be barred by a judgment in an "old" and "different cause," one so different that the new could not be added to it by way of amendment. This is not a second suit for the same cause of action, but a new suit for a distinct cause of action. That it is new and distinct from that formerly brought appears from the record attached to the plea. The case should not have been dismissed.

Judgment reversed. All the Justices concur.

FOX v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Dec. 14, 1904.)

[101 N. W. Rep. 624.]

Intoxicated Passenger—Standing on Platform—Duty to Warn.*— Where a carrier failed to warn an intoxicated passenger of the danger incident to his going onto the platform of the car while the train was in motion, though the carrier's servant had knowledge of the passenger's intention to do so, the carrier could not defend an action from injuries sustained by the passenger falling from such platform on the ground of his contributory negligence.

Same—Same—Personal Injury—Duty to Warn.—In an action for injuries to an intoxicated passenger, caused by his falling or being thrown from the platform of a train while in motion, facts held to justify a refusal to direct a verdict for defendant.

Same—Personal Injury—Selling Liquor—Civil Liability—Release—Effect on Railroad Company's Liability.—Where a plaintiff was injured while intoxicated by falling from a railroad train, and his wife thereafter sued to enforce her statutory right of action against the saloonkeepers, and their bondsmen, from whom plaintiff had obtained the liquor, which cause of action plaintiff and the wife thereafter released, such release did not discharge any right of action plaintiff had against the railroad company for the injuries sustained.

Grant, J., dissenting.

Error to Circuit Court, Calhoun County; Joel C. Hopkins, Judge.

Action by Arthur E. Fox against the Michigan Central Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

S. S. Hulbert (*Henry Russel* and *O. E. Butterfield*, of counsel), for appellant.

Hatch & Page, for appellee.

MOORE, C. J. The plaintiff, while intoxicated, stepped off the platform of a moving train belonging to defendant. He sued, and recovered a judgment for the injuries he received. The case is brought here by writ of error.

No error is assigned in relation to the admission of testimony or the charge of the court. The only one assigned is: "The court erred in not sustaining defendant's motion to take the case from the jury upon the grounds stated in said motion." The reasons stated in the motion are: "(1) Because the contributory negligence of the plaintiff bars his recovery, because, among other points, as a matter of law, he was not in the exercise of due care or ordinary care in going out upon and being on the platform of the moving train while he was in that intoxicated condition; and because the brakeman did act with sufficient promptness to satisfy the law, the plaintiff not being entitled to

*As to the duties and liabilities of the carrier with respect to passengers, or prospective passengers, in a state of intoxication, see foot-note appended to *Tuttle v. Cincinnati, etc., Ry. Co.* (Ky.), 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333.

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throw upon the brakeman the risk, hazard, and necessity of accurately and instantly judging plaintiff's intoxicated condition, and of acting effectively in regard thereto; and because the negligence of the company was not gross, wanton, and reckless. (2) The release by the defendant to William G. Nonem and others, in evidence in this case, is a complete bar to this action."

1. It is said: "When a situation involving an instant choice of acts—of alternatives—is forced upon A. by the negligence of another, A. is not held, at his peril, to choose and act correctly, and with that same careful judgment which he would have exercised if he had time for a deliberate, instead of instant, determination. Under the circumstances, the company can only be held for gross, wanton, and reckless negligence. Under all the circumstances, the failure of the brakeman to instantly and correctly sense the situation, especially when considered with his subsequent prompt effort to deter plaintiff from going out on the platform—an act which did not necessarily involve danger to plaintiff—cannot be considered as gross, wanton, or reckless." Citing sections 103-104, Baldwin on Personal Injuries. The testimony of Miss Bestel and Mr. Hoskins, which is not contradicted, is to the effect that at the station, just before taking the train, plaintiff "was very much under the influence of liquor; beastly drunk; staggering around." The plaintiff was a witness, but claimed he was so drunk when he was on the train and at the time of the accident that he could remember but little about what occurred. His testimony throws very little light upon the situation. The only testimony giving a connected account of what occurred is the testimony of one of the passengers (Mr. Anderson), which in part is as follows: "Saw him on March 7, 1902, in the Michigan Central Depot at Marshall, about noon. My attention was called to him because he was staggering and very intoxicated. In every way, he looked like an intoxicated person. I was going to Battle Creek on the noon train that day, and did go on that train. Saw plaintiff on the train, but did not see him get on. First time I noticed him was after we reached Nichols Station, or was about leaving that station. I was sitting in the front end of the smoker, about the third or fourth seat from the front, on the left-hand side. He was beastly drunk. He was staggering, and his face was covered with drool, and all over his mouth, and his clothes were displaced. I saw the brakeman at that time. I called the brakeman's attention. He came up to the front of the coach as we were leaving Nichols Station, and I called his attention to plaintiff, who was trying to get out of the door. I said: 'That man ought not to be allowed on the platform.' He didn't say anything. I saw he was not going to start to stop him, and I started for the door. The brakeman certainly must have heard me, because he turned around and looked at him when I spoke. The brakeman had time, after I spoke to him and told him that plaintiff ought not to be allowed on the platform, to have intercepted him, if he had acted

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at once. I got to the door and started to open the door, and the brakeman came right behind me. Plaintiff was on the platform, and just as I opened the door he fell off the platform under the coach on the left-hand side. He looked, apparently, to have gone under the wheels, but I cannot say. I said to the brakeman: 'You ought to stop this train. That man is run over.' He said, 'O, no; he is not;' and he didn't stop the train." On the cross-examination he testified: "Q. Mr. Anderson, how soon after Mr. Fox went to the door and started out on the platform did you start after him? A. Just a very few seconds. I do not know how many. Q. And the brakeman was practically right on your heels? A. He was back of me; yes, sir. Q. Going the same way that you were? A. He had started back through the car, and, as I started toward the door, followed me toward the place where Fox was. At the time I started out on the platform after plaintiff, the plaintiff was trying to open the door. He was staggering so that he could hardly get it open. He grabbed for the knob and missed it, and grabbed for it again. He was so drunk he could hardly stand up. Q. This was after you told the brakeman that he ought not to let that man out on the platform? A. No, sir; he was trying to get on the platform, but he had not got out yet. Q. You saw plaintiff fumbling with the door knob, or groping for it and trying to get it, and then you spoke to the brakeman, that he ought not to let him go out? A. I said that he ought not to be allowed on the platform. I did not say he should not do it. Q. Then Fox, continuing in his efforts, got the door open, and you started after Fox? A. No, sir; Mr. Fox started to open the door, and had it nearly open, and then I started to stop him from going out. Q. And the brakeman after you? A. Yes, sir. Q. It was all a matter of a few seconds? A. Yes, sir." On the redirect examination he testified: "Q. You stated the brakeman started after you called his attention, that he looked at Fox, and that he started back? A. Yes, sir; he did not start toward Mr. Fox. He started back. I think he had time to reach Fox before he got on the steps, when I called his attention to him. It was only two or three seats back. I spoke out loud, and I am sure he heard me, because he looked at Fox, and paid no further attention to him. He said nothing until he got out on the platform. I asked him to stop the train, and he said, 'No, he is not hurt,' and we could not see him from the platform." The testimony of the policeman who helped place the plaintiff on a stretcher when he was found lying on the ground and was removed to the hospital was to the effect that "plaintiff was then so drunk as not to realize his condition, and was not able to help himself." This testimony is uncontradicted. The defendant showed upon the trial that an unsuccessful effort had been made to produce the brakeman as a witness at the trial.

The authorities cited by counsel for defendant do not throw much light upon the question. Van Zile on Bailments & Carriers, § 653, reads: "It is a general rule that a passenger must

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exercise ordinary care and diligence in avoiding injury. But while this is true, it may be said that it is the duty of the carrier to warn the passenger as to dangerous situations, and, failing to do so, the carrier will not be permitted to defend upon the ground of contributory negligence upon the part of the passenger in an action for an injury received because of such danger. This duty to warn the passenger against danger does not apply, of course, to every case. The circumstances of the particular case are to be taken into consideration. As, for example, where a passenger cannot be said to understand the danger of his situation, or where the passenger is a young person, inexperienced, and not aware of the danger in which he is placing himself, or one who is somewhat demented or even intoxicated, or deaf and dumb or blind—such persons require more attention, and the duty of the carrier is to extend to them greater care than to the ordinary passenger. These, of course, are but examples. Each case must stand upon its own particular circumstances.” In *Cooley on Torts* (2d Ed.) p. 768, it is said: “Where the business of a carrier is to transport both persons and property, his obligation and his consequent liability in respect to the two are different. For the safe transportation of the property he is responsible as insurer, with the exceptions already stated, but in the case of passengers he only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent: that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants. And this liability is applied with great strictness, as well as great justice, when he undertakes to transport passengers by the powerful and dangerous agency of steam.” In *Railway Co. v. Bohn*, 27 Mich. 503, Justice Cooley, speaking for the court, said: “That the duty of the railway company not to permit persons to ride in unsafe places on their cars is the same, and rests upon the same reasons, with their duty not to make use of vehicles wholly unsafe, appears to me entirely clear. There are, without doubt, some limitations upon that duty, growing out of the manner in which their business is usually and properly conducted, but it does not become necessary to consider those limitations at any length in the present case. Such carriers could not, in reason, be required to be insurers of their passengers against all dangers, nor, perhaps, to employ a person to keep watch upon their passengers to protect them against dangers resulting from their own folly or neglect.

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Perhaps it is admissible that the driver should be also conductor, in which case he could not be expected to watch against persons falling off the rear platform or crawling out of the window. If, however, it was dangerous for passengers to stand or sit on the front platform, where the driver himself would be, it would not only be his right and duty to notify any who might occupy it of the danger, but, if they were of an age not to be likely to understand the risk, or able to judge for themselves, or if he knew them to be insane or otherwise unable to exercise discretion, the duty would not be fully performed without an enforcement of proper regulations to compel their occupying positions less exposed." In *Kingston v. Railway Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131, Justice Long, speaking for the court, said: "The court charged the jury: 'If you find that, the time he was upon this place, he was intoxicated, then he could not recover in this case, because in the case of an intoxicated man the company was not expected and the law would not require of this company that it should guard an intoxicated man against injury, standing in the place he was standing.' This charge was erroneous. It was asserted by the plaintiff that he was pushed off or thrown off by defendant's conductor, and the fact that he was intoxicated would not give the conductor the right to push him off. The question of his intoxication was a matter to be taken into consideration by the jury in determining whether or not the plaintiff was in the exercise of due care in standing upon the running board while he was in that intoxicated condition, but his condition would be no excuse to the company if its conductor negligently and wrongfully pushed him off. In *Thomp. Neg.* p. 1174, it is said: 'Intoxication on the part of the plaintiff at the time of the accident does not constitute negligence, in law, warranting a nonsuit or a peremptory instruction for the defendant, but is a circumstance to go to the jury on the question of contributory negligence.' This seems to be the general rule. *Stuart v. Machias Port*, 48 Me. 477; *Alger v. City of Lowell*, 3 Allen, 402." See, also, *Railway Co. v. Caldwell*, 74 Pa. 421; *Brennan v. Railroad Co.*, 93 Mich. 156, 53 N. W. 358; *Railroad Co. v. Johnson*, Adm., 108 Ala. 62, 19 South. 51, 31 L. R. A. 372.

In the case at bar it is shown beyond any reasonable question that the plaintiff, while beastly drunk, was making an effort to go from a place of safety to a place of danger. The attention of the brakeman was called to the situation by a passenger who saw the danger. Instead of going to the drunken man and attempting to prevent his exit from the car, he went in the other direction. It was not until after the passenger, seeing the failure of the brakeman to act, attempted to prevent the danger, that the brakeman made any effort in that direction. This effort came too late. The brakeman looked, and the jury might have inferred he saw the condition of the plaintiff.

Under the facts disclosed by the record and the law we have cited, we do not think it can be said the court erred, as to this

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feature of the case, in refusing to direct a verdict for the defendant.

2. This defense is based upon the following facts: Previous to the trial of the case at bar, Mrs. Fox, the wife of plaintiff, sued the saloonmen who sold Mr. Fox the liquor which made him intoxicated, and their bondsmen. Afterwards, and before the case was tried, the case was settled, and Mr. Fox joined in a receipt releasing the defendants in that action from liability. It is now said the saloonmen who were defendants in that case and the defendant in this case are joint tort feasons, and the release of one released all. The trouble with this proposition is that the wife had a cause of action given to her by the statute against the saloon keepers and their bondsmen, while the plaintiff had no such cause of action, and in joining in said release he did not release any right of action he might have against the railroad company.

Judgment is affirmed.

CARPENTER, MONTGOMERY, and HOOKER, JJ., concurred with the CHIEF JUSTICE.

W. C. AGEE & Co. v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, July 23, 1904.)

[37 So. Rep. 680.]

Carriers — Unlawful Discrimination — Refusal of Car Service.*—A railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and is, as such, bound to treat the houses located along the track without discrimination, and cannot discontinue its service as to one and continue it as to others.

Practice—Injunctions—Motions to Dissolve—Consideration of New Matter.—Where a bill for an injunction alleged the discontinuance by respondent of its car service to complainants while continuing it for the benefit of others, an answer alleging that the discontinuance was caused by complainants' refusal to pay a debt due respondent, set up new matter, which could not be considered on the hearing of a motion to dissolve the temporary injunction.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Bill for injunction by W. C. Agee & Co. against the Louisville & Nashville Railroad Company. From a decree dissolving a temporary injunction theretofore issued, complainants appeal. Reversed.

Frank S. White & Sons, for appellants.

J. M. Falkner, George W. Jones, and W. I. Grubb, for appellee.

*See foot-note appended to *State v. Chicago, etc., R. Co.* (Neb.), 13 R. R. R. 336, 36 Am. & Eng. R. Cas., N. S., 336.

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PER CURIAM. Complainants are wholesale provision dealers conducting business in a house near Railroad avenue in Birmingham, and have been receiving and shipping away goods over a railroad track located adjacent to that house, and operated by the defendant, the Louisville & Nashville Railroad Company. For some years next before the 7th day of May, 1903, that company had continuously served persons having business houses located along that track by delivering at their respective houses cars of freight and cars to be freighted and shipped, and had so served complainants from the spring of 1902 to the 7th day of May, 1903, when, having a few days theretofore given notice of its intention to do so, it discontinued that service to complainants, but continued furnishing it to others along that track. Besides other facts set forth in the bill, the foregoing are alleged, and are not denied in the answer except as to the capacity in which the railroad company operated the track referred to. As to that the answer avers the track was owned by and was on lands of complainants and persons other than defendant, and that the car service thereon was not rendered by the railroad company as a common carrier.

One theory upon which complainants seek relief is that the alleged refusal of car service constitutes unlawful and injurious discrimination. Assuming the truth of the bill, that theory is well founded. The facts alleged in the bill and not denied in the answer show the Louisville & Nashville Railroad Company was a common carrier with respect to the use it made of the track in question. As a common carrier it was under obligation to treat the public without unfair discrimination. In the answer it is averred, in substance, that before and when the car service was refused complainants owed and had refused payment of a debt to the Louisville & Nashville Company accruing for detention of cars, and that by reason of this fact, together with a rule of a car service association whereunder that and other railroad companies were operating, the discontinuance of car service to complainants was authorized. This is new matter within the meaning of the rule which on the hearing of a motion to dissolve an injunction on answer made confines the court's consideration to matters which are in denial of the bill's averments. To now determine whether this new matter can be availed of to prevent relief on final hearing would be inappropriate. The bill has equity, and, apart from new matter set up in the answer, no defense is shown. We are of the opinion that the injunction should be retained until the further hearing of the cause, and will order that this be done, and that the decree of dissolution be reversed, and the cause remanded.

Reversed and remanded.

TIBORSKY v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, Feb. 21, 1905.)

[102 N. W. Rep. 549.]

Accident on Track—Res Ipsa Loquitur.*—Where a pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, the doctrine of *res ipsa loquitur* was not applicable.

Same—Question for Jury.—Where a pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, the question of the railroad's negligence held one for the jury.

Res Gestæ.†—Where a pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, and he immediately went into the depot, and told the telegraph operator, his statements in reply to the pedestrian were not admissible as *res gestæ* in an action against the railroad.

Appeal from Circuit Court, Washington County; James J. Dick, Judge.

Action by Frank Tiborsky against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action to recover damages for personal injuries sustained by the plaintiff by reason of having stumbled over a truck belonging to the defendant, and alleged to have been negligently and wrongfully left upon the public sidewalk in front of the defendant's depot platform on the evening of December 23, 1902. The answer admits the allegations of the complaint to the effect that at the times therein mentioned the plaintiff was a resident of the city of Hartford, in this state, and conducting a shoe store therein; that the defendant corporation owned and operated a railroad running through that city during all of such times; that the principal business street in that city extends from the north to the south, and is known as "Main Street," with side-

*As to whether a presumption of negligence arises from the mere fact that a passenger is injured, see foot-note appended to *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Cheetham v. Union R. Co. (R. I.)*, 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292; foot-notes appended to *Cronk v. Wabash R. Co. (Iowa)*, 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429; *Thurston v. Detroit United Ry. Co. (Mich.)*, 12 R. R. R. 434, 35 Am. & Eng. R. Cas., N. S., 434; foot-notes appended to *Fitch v. Mason City & C. L. Traction Co. (Iowa)*, 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; *Feldschneider v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 1 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Logan v. Metropolitan St. Ry. Co. (Mo.)*, 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; *Allen v. Northern Pac. Ry. Co. (Wash.)*, 12 R. R. R. 838, 35 Am. & Eng. R. Cas., N. S., 838.

†For the authorities in this series on the question whether statements of injured persons are *res gestæ*, see foot-note appended to *Williams v. Southern Ry. (S. Car.)*, 12 R. R. R. 604, 35 Am. & Eng. R. Cas., N. S., 604.

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walks constructed and maintained on each side thereof by the city, for the accommodation of the public traveling on foot; that the defendant's railroad tracks run east and west across that street at right angles with it; that the defendant's passenger station is located on its right of way immediately south of said railroad tracks, and west of said Main street; that the depot platform used in connection with said depot and said tracks also extends from said depot east and up to the sidewalk on the west side of Main street; and that the agents and employees of the defendant in the discharge of their usual and required duties were accustomed to use trucks with which to carry baggage, express matter, and other material over and upon said platform and sidewalk. The answer specifically denied the other allegations of the complaint to the effect that December 23, 1903, the defendant's agents and servants unlawfully, wrongfully, negligently, and carelessly obstructed said public sidewalk at the east end of said platform by wrongfully, negligently, and carelessly placing upon and leaving thereon, one of said trucks so being used and belonging to the defendant, and thus obstructing the sidewalk and imperiling the safety of travelers thereon at the time in question; that about 8 o'clock on that evening the plaintiff, while passing along upon that sidewalk on the west side of Main street and at the east end of said railway passenger station and platform, in the exercise of due care, was suddenly tripped by said truck, and fell over the same with great force, and was badly injured; that the night was dark and foggy, and there were no lights at or near where the truck was so located at the time; that by reason of such injury the plaintiff had suffered great and permanent damage, for which he demands judgment. The issues so joined were tried by the court and the jury, and at the close of the testimony on the part of the plaintiff the court granted a nonsuit, and from the judgment entered thereon in favor of the defendant the plaintiff brings this appeal.

R. C. Russell and *S. S. Barney*, for appellant.

C. H. Van Alstine and *H. H. Field*, for respondent.

CASSODAY, C. J. (after stating the facts). In addition to the facts alleged in the complaint and expressly admitted in the answer, as indicated in the foregoing statement, there is evidence tending to prove that the platform on the east side of the depot extended to the sidewalk on the west side of the street; that such sidewalk was about five feet wide, and came up flush with the depot platform, and was of the same width and a continuation of the street sidewalk immediately north and south of it. Passengers were in the habit of taking their baggage up to that sidewalk and shoving it onto the platform, where it would be received by the baggageman. The regular train reached the depot that evening on schedule time, 6:30 p. m., and departed at 6:38 p. m. The truck in question was about 4½ feet long, 2 feet wide, and from 8 to 10 inches high when lying flat on the sidewalk. At

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the lower part there was a rim of steel or iron that projected out, about half an inch thick and 6 inches wide on the slant, with a blunt edge to shove under the truck, and was as long as the truck was wide. It had two legs of iron or steel. When the truck was lying down, the rim with the blunt edge naturally projected forward, and would be about 16 inches from the ground. The truck belonged to the defendant, and was used to wheel trunks from where they were unloaded off the cars to the dray wagon, and in doing so would pass over the sidewalk in question. The baggageman left the depot that evening just after the train left. It was his duty to handle the baggage, and he received 16 pieces of baggage on the day in question, but he did not know anything about the amount of baggage in the baggage room that evening. The plaintiff was over 40 years of age at the time of the accident. Between 7 and 8 o'clock on the evening in question he started alone from his store to go up to the Catholic schoolhouse to attend church. It was so dark that he could not see anything on the walk in front of him, and it was windy. When he came by the depot, he fell over the truck standing on the Main street sidewalk, at the end of the depot platform. At first he did not know what it was that he had fallen over. It hit him in the leg—in the shins. It was about 30 feet from the depot door. He got up and went into the depot, and there found O'Neil, the night telegraph operator, and told him what had happened. They went out together, and found the truck on the sidewalk. O'Neil testified that he took the truck and put it in the baggage room, and that he did not know whether the door of that room was locked or unlocked; that it was not supposed to be unlocked. The evidence mentioned was admitted without objection.

1. Error is assigned because the court took the case from the jury and granted a nonsuit. In support of such contention counsel cite a class of cases where the mere proof of the accident was held to create a presumption of negligence. *Cummings v. The National Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Carrol v. The C. B. & N. R. Co.*, 99 Wis. 399, 403, 75 N. W. 176, 67 Am. St. Rep. 872. But such rule has its qualifications, as has repeatedly been pointed out by this court. *Spille v. Wis. B. & I. Co.*, 105 Wis. 340, 349, 81 N. W. 397; *Musbach v. The Wis. C. Co.*, 108 Wis. 57, 67, 84 N. W. 36; *Beyersdorf v. Cream C. S. & D. Co.*, 109 Wis. 456, 463, 84 N. W. 860. It is enough to say here, as to that question, that the rule mentioned is not applicable to the case at bar. But it does not follow that the case was properly taken from the jury. Of course, the burden of proving actionable negligence was on the plaintiff. It is true, moreover, that the facts in this case are undisputed. It has often been said that: "Negligence, in one sense, is a quality attaching to act dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such

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duties and relations." *Townley v. The C., M. & St. P. Ry. Co.*, 53 Wis. 633, 11 N. W. 55; *Kaples v. Orth*, 61 Wis. 533, 21 N. W. 633; *Hart v. West Side R. Co.*, 86 Wis. 489, 490, 57 N. W. 91. It is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. When the standard of duty is a shifting one, it is generally a question for the jury. *Id.* It is only when the facts and circumstances are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, that the court is justified in taking the question from the jury. "When such facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury." *Kaples v. Orth*, 61 Wis. 533, 21 N. W. 634. Here the truck was the property of the defendant. It was customarily used by the defendant's employees at and near the place where it was found at the time of the accident. That place was a public sidewalk upon which people on foot were liable to pass at night or day, and had the legal right to pass. It was a dark night. In the absence of knowledge to the contrary, the plaintiff had the right to assume that the sidewalk was a safe place upon which to walk. The presence of such a truck upon the walk might render it unsafe for travelers on foot under the circumstances disclosed in the evidence. Counsel for the defendant says there was no testimony as to who left the truck upon the sidewalk that evening. There is some evidence tending to prove that the truck was customarily used by the defendant's agents and employees at and near the place of the accident, and there is no evidence tending to prove that any one not in the employ of the defendant had anything to do with the truck. In that respect it differs from *Stimson v. Ry.*, 75 Wis. 381, 383, 44 N. W. 748. After careful consideration, we are constrained to hold that the evidence was sufficient to take the case to the jury.

2. After the accident the plaintiff went into the depot, and told the night telegraph operator what had happened, as stated above. Error is assigned because the court excluded the reply of the night telegraph operator. It is claimed that such statements were admissible as a part of the *res gestæ*, and the counsel cite in support of such contention, among other cases, *Hooker v. Ry.*, 76 Wis. 542, 547, 44 N. W. 1085; *Hermes v. The C. & N. W. R. Co.*, 80 Wis. 590, 592, 50 N. W. 584, 27 Am. St. Rep. 69; *Christianson v. The Pioneer F. Co.*, 92 Wis. 649, 653, 66 N. W. 699; *Bliss v. State*, 117 Wis. 596, 94 N. W. 325; *Hupfer v. Nat. Distilling Co.*, 119 Wis. 417, 96 N. W. 809. As stated by way of quotation from a standard text-writer in one of these cases: "The idea of the *res gestæ* presupposes a main fact or principal transaction, and the *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Hermes v.*

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The C. & N. W. Ry. Co., 80 Wis. 592, 50 N. W. 585, 27 Am. St. Rep. 69. The declarations held to be admissible as a part of *res gestæ* in these cases were in some way connected with the main fact of transaction under consideration, and served to illustrate its character. 1 Greenl. Ev. (15th Ed.) § 108. There is no dispute in the case at bar as to the plaintiff's injury, nor as to the manner in which it occurred. The main fact here in controversy is, as to whether the truck was left upon the sidewalk by the negligence of the defendant. There is no evidence tending to prove that the night telegraph operator was an actor or participant in that transaction, much less that his declarations sought to be proved were a part of the *res gestæ*. There is no pretense that such declarations were admissible merely because the night telegraph operator was in the employ of the defendant. No such claim could be maintained. 1 Greenl. Ev. (5th Ed.) §§ 113, 114; Sidney Sch. F. Co. v. Warsaw S. D., 122 Pa. 494, 500, 15 Atl. 881, 9 Am. St. Rep. 124; Dorne v. S. M. Co., 11 Cush. 205; Fogg v. Child, 13 Barb. 246. We must hold that there was no error in excluding such declarations.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

VIRGINIA PASSENGER & POWER Co. *et al.* v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, March 9, 1905.)

[49 S. E. Rep. 995.]

Streets Railways — Franchise — Rates of Fare — Transfers — Contractual Obligations.*—Where the ordinance granting a franchise to a street railroad company imposed certain conditions as to rates of fare and giving of transfers, and the company operated its lines in accordance with these regulations, it thereby assumed contractual obligations with respect to such regulations.

Same—Same — Same — Same — Line Partially Owned by Another Company—Application of Ordinance.†—The ordinance granting a

*See *Vining v. Detroit, Y. A. A. & J. Ry.* (Mich.), 8 R. R. R. 120, 31 Am. & Eng. R. Cas., N. S., 120 (street railway bound by franchise fixing passenger rates); *City of Detroit v. Detroit Citizens' St. Ry. Co.* (U. S.), 2 R. R. R. 851, 25 Am. & Eng. R. Cas., N. S., 851 (an ordinance adopted under legislative authority, which provides that the rate of fare to be charged by a street railway shall not exceed 5 cents, gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company under the right to prescribe from time to time rules and regulations for the running and operations of the road); foot-note appended to *Newport News, etc., Co. v. Hampton Roads, etc., Co.* (Va.), 12 R. R. R. 543, 35 Am. & Eng. R. Cas., N. S., 543 (power of a municipality to limit and otherwise affect the right of street railway to use street by subsequent ordinances).

†For the authorities in this series on the subject of street railway transfers, see foot-note appended to *Hornesby v. Georgia Ry. & Electric Co.* (Ga.), 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421.

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franchise to a street railroad company provided that it should sell half-fare tickets between certain hours, and give transfers at points where one line intersected with another. The company owned a line which extended from its point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which, however, ran its cars with the same operatives into the city and to the point of intersection. Held, that this line was an intersecting line, to which the provisions as to half-fare tickets and transfers applied.

Appeal from State Corporation Commission.

Petition by the Virginia Passenger & Power Company and the Richmond Passenger & Power Company against the commonwealth of Virginia to the State Corporation Commission. From an order denying the petition, petitioners appeal. Affirmed.

M. M. Martin and *A. B. Guigon*, for appellants.

The Attorney General, *F. M. Corner*, and *H. R. Pollard*, for the Commonwealth.

KEITH, P. This case is before us upon an appeal from an order of the State Corporation Commission requiring the appellants to sell certain tickets, known as "labor tickets," at the rate of two for five cents, and to issue transfers between the Seven Pines line of the Virginia Passenger & Power Company and the intersecting line in the city of Richmond of the Richmond Passenger & Power Company.

With its order refusing the petition of the Virginia Passenger & Power Company and the Richmond Passenger & Power Company, the State Corporation Commission filed a paper setting forth its reasons, which are as follows:

"On the petition of the two defendant railroad companies for permission to alter and advance their rates and charges.

"The defendant railroad Companies, the Virginia Passenger & Power Company and the Richmond Passenger & Power Company, having filed in this proceeding their joint petition praying that an order may be entered permitting the discontinuance of the sale of labor tickets on the Seven Pines line, operated by the Virginia Passenger & Power Company, and permitting the discontinuance of the issue and receipt of transfers between the said Seven Pines line and the Richmond Passenger & Power Company, and separate answers to said petition having been filed by William E. Oakley and the city of Richmond, and a full hearing having been had before the commission on the 24th day and 25th day of May, 1904, the commission has carefully considered all of the pleadings, the various exhibits filed with the pleadings and at the hearing, the testimony of witnesses, and the arguments of counsel, and, proceeding now to dispose of the question at issue, the commission finds:

"(1) That the defendant the Richmond Passenger & Power Company acquired the right to operate as a street railway company in the city of Richmond under the grant and franchises contained in an ordinance passed by the council of the city of

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Richmond on the 23d day of December, 1899, and the amendments thereof, and subject to the terms, provisions, and restrictions contained in the said ordinance and amendments; that the said ordinance was accepted by the said Richmond Passenger & Power Company, and became operative in the month of August, 1900, and since that date the line of the Richmond Passenger & Power Company connecting with what is and was known as the 'Seven Pines Line,' at Twenty-Ninth and P. streets, was operated under the terms and provisions of said ordinance.

"(2) That at the time the said Richmond Passenger & Power Company obtained from the city of Richmond the said ordinance aforesaid, and acquired its rights thereunder, the said Seven Pines Line was operated by the Seven Pines Railway Company, having its apparent terminus at the said Twenty-Ninth and P streets, in the city of Richmond. The defendant the Virginia Passenger & Power Company became by subsequent deeds the owner of the said Seven Pines line at the point from the limits of the city of Richmond to Seven Pines, in the county of Henrico, and is now operating the same, running its cars with the same conductors and motormen continuously through to said corner of said Twenty-Ninth and P streets; the portion of said line from the city limits to Twenty-Ninth and P streets having been conveyed to the Richmond Passenger & Power Company.

"(3) That by the provisions of the said ordinance of the city of Richmond of December 23, 1899, it was provided in subsection 5 of section 2, among other things, that the Richmond Passenger & Power Company should sell to all passengers, between the hours of 6 a. m. and 7 a. m., tickets at the rate of two for five cents, to be used only between the hours of 6 and 7 a. m. from Monday to Saturday, inclusive, said tickets being commonly known as 'labor tickets'; and it is further provided in said subsection of said section that each passenger, having paid his fare, may demand and receive from the conductor of the car upon which he first took passage a transfer ticket, without additional charge, which fare and transfer ticket should entitle such passenger to ride upon such car upon which he has taken passage to the point where the said line intersects with the line to which said passenger desires to be transferred, and after arriving at said point of intersection such passenger may take passage on the line indicated on said transfer ticket, and, on the surrender thereof to the conductor of such car, shall be permitted to ride to the end of the last-mentioned line. And it seems to the commission that these provisions of the said ordinance constitute a contract binding upon the said company, and with which it is obliged to comply.

"(4) That soon after said ordinance of December 23, 1899, became operative, the Richmond Passenger & Power Company and the then owners and operators of the said Seven Pines line put into effect and continued a system of transfers whereby passengers on either line, going in the direction of and wishing to be transferred to the other line, were given transfers for that

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purpose, which were received by the conductors of the respective lines, and passengers were so carried on a single fare to the end of each of these lines, and that on or about the same time the said labor tickets were put into effect on each of the said lines, and mutual transfers on said labor allowed by and between the said lines, the point of transfer between the said two lines being at Twenty-Ninth and P streets, and that this arrangement for mutual transfers at the said point, and the sale of labor tickets, with the right of transfer on them, continued without interruption until the controversy now before the commission was brought about.

“Under the foregoing facts now found by the commission, and with all the testimony before it bearing upon these facts, the commission is of opinion that the council of the city of Richmond, in using the word ‘line’ in the section of the ordinance above mentioned, employed that word in its popular signification, and with reference to the circumstances out of which the granting of the said ordinance grew, and with reference to the urban and suburban street railroad conditions in and around the city of Richmond at that time, and that the line then known and since known as the ‘Seven Pines Line’ was an intersecting line. And considering the question before the commission in all its aspects, the commission is of opinion that it should not permit the two defendant companies to change the system of transfers and labor tickets which have been in effect for several years, and with reference to which the patronage of the defendant lines in the city of Richmond and in the growing section of Henrico county, adjacent to the city, along which the Seven Pines line runs, has been acquired.

“It is therefore ordered by the commission that in the matter of the said labor tickets, and the said transfers between the Seven Pines line of the Virginia Passenger & Power Company and the intersecting line in the city of Richmond of the Richmond Passenger & Power Company, the present system of the sale of said labor tickets and the interchange of transfers be continued, and that the advance in rates of fares which would follow from granting the petition of the two said companies in this proceeding be refused.

“It is therefore ordered that the application made in this proceeding by the Virginia Passenger & Power Company and the Richmond Passenger & Power Company be denied.”

It thus appears that, in view of the Corporation Commission, the railroad companies had assumed contractual obligations with respect to the sale of labor tickets and the giving of transfers in controversy. We think that the construction placed by the Corporation Commission upon the ordinance of the city is a reasonable and proper one, and this conclusion is greatly strengthened by the fact that it is the construction acted upon the appellants, commencing a short time after the passage of the ordinances by the city, and continuing for about four years, when the rail-

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road companies discontinued the sale of labor tickets and the giving of transfers, which led to the institution of the proceedings before the Corporation Commission. We have given the views of the Corporation Commission in full, because they are so clear and convincing that we are content to adopt them as the opinion of this court.

Upon the whole case, we are of the opinion that there is no error in the order complained of, which is affirmed.

BUCHANAN, J., absent.

CHESAPEAKE & O. RY. v. HARRIS.

(Supreme Court of Appeals of Virginia, March 9, 1905.)

[49 S. E. Rep. 997.]

Injury to Alighting Passenger—Fall into Ditch—Negligence.*—In an action for injuries to a passenger by his falling into a ditch in going from a train to the platform on a dark night after he had alighted on direction of the trainmen, the evidence held to show that the company had failed to exercise that degree of care which the law required.

Same—Same—Contributory Negligence—Failure to Alight on Side Next to Platform.†—Where passengers were alighting on a dark night from a train indiscriminately on both sides, with the knowledge and assistance of the trainmen, and plaintiff, without knowledge as to the existence of the platform, fell into a ditch after alighting, he was not guilty of contributory negligence because, the company having provided a suitable platform for the purpose, it was his duty to use it.

Same—Same—Same—Same.‡—Where plaintiff, who was ignorant of the surroundings, was directed to get off a train and go to the depot, and people were getting off on both sides of the train, evidence that he stated he did not get off on the other side of the train because there was such a rush, and he never followed a crowd in a rush, does not show a want of due care.

Same—Same—Same—Right to Assume That Carrier Had Done Its Duty.‡—Where plaintiff, after alighting from a train and making his way to the platform, did not know, when walking on the end of the ties and holding to a car, that he was on a trestle or that he was in

*For the authorities in this series on the question of the care required in discharging passengers, see foot-notes appended to *Willworth v. Boston Elevated Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69; foot-note appended to *Chesapeake & O. Ry. Co. v. Smith* (Va.), 15 R. R. R. 241, 38 Am. & Eng. R. Cas., N. S., 241.

†For the authorities in this series on the subject of the contributory negligence of passengers in alighting from cars, see foot-note appended to *Chicago Union Traction Co. v. Hanthorn* (Ill.), 15 R. R. R. 19, 38 Am. & Eng. R. Cas., N. S., 19.

‡See *Leveret v. Shreveport Belt Ry. Co.* (La.), 9 R. R. R. 611, 32 Am. & Eng. R. Cas., N. S., 611 (passengers boarding or alighting may assume that carrier's employees have taken proper precautions to insure their safety); *Clerc v. Morgan's Louisiana & T. R. Co.* (La.), 4 R. R. R. 690, 27 Am. & Eng. R. Cas., N. S., 690 (right of passenger to rely on care and watchfulness of carrier).

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a dangerous position, he was not negligent, as he had the right to assume that the company had discharged its duty in making the approaches from its passenger cars to the station reasonably safe.

Appeal—Review.—Where, on the whole case, no verdict other than that rendered against defendant could have been rightfully found, it is unnecessary to consider objections to instructions.

Error to Circuit Court, Fluvanna County.

Action by Julian O. Harris against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Leake & Leake, for plaintiff in error.

Daniel Harmon and T. S. Martin, for defendant in error.

BUCHANAN, J. About 8:30 o'clock on the evening of April 13, 1903, Julian O. Harris was injured by falling into a culvert or ditch while making his way from a passenger train of the Chesapeake & Ohio Railway Company to its station at Bremono, in the county of Fluvanna, and this action was brought to recover damages therefor on the ground that his injuries were caused by the negligence of the defendant company.

It appears that the plaintiff had on the morning of that day gone from Hardware, a station on the defendant's road west of Bremono, to Richmond, on an excursion train. That evening he, with many other persons boarded, as they supposed, the excursion train upon which they had gone to Richmond, to return home. After leaving Richmond, and before getting to Bremono, they were informed by the conductor that his train, being the regular accommodation from Richmond to that point, did not go beyond Bremono, and that they would have to get off his train there and wait at the station for the excursion train, which was following.

When the train upon which they were traveling reached Bremono, the engine was stopped at the usual place, but the train being longer than usual—consisting of the engine, a baggage car, and four passenger cars—the rear car and part of the next car in front of it did not reach the passenger platform, which was on the north side of the track. The passengers were directed to get off the train, so that it could be moved from the main track to a siding to make way for the excursion train.

The plaintiff, who was in the rear car, states that when the train stopped for Bremono it was very dark and raining; that he knew nothing about the place; that he started to get off the car, and some one said, "Do not do that. The depot is on the other side;" that he alighted on the depot side, and walked a few steps on the end of the ties, holding to a car that was standing on the track; that walking on the ties was so rough that he thought he would get off the ties, and onto a path which he expected to find on the side of the track, and, as he did so, or after making a few steps, he fell into a ditch, which was about 13 feet deep, and received the injuries complained of; that he saw neither conductor nor brakeman after the train reached Bremono; that no one directed

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or showed him which way to go; and that there was no light by which to be guided.

It is not denied that the night was dark, and that there was a heavy rain falling when the train reached Bremo. The statement of the plaintiff that the approaches to the depot and platform where he got off were without lights, and that no one rendered aid or assistance to persons getting off the rear of the train, is not only sustained by witnesses of the plaintiff, but also by the defendant's witness Thomas, who was with the plaintiff when he left the train, and near him when he was injured, and who states that when they got off the train there was no light to guide the passengers to the depot, nor was there any care taken by the trainmen to secure their safety, and that it was so dark they could not tell which way to go. The ditch into which the plaintiff fell was south of the depot siding, and not more than 15 or 18 feet from the passenger train.

The conductor of the passenger train states that he and his brakeman—he had only one—were on the passenger platform with their lanterns, assisting passengers to alight, and directing them to the depot, on the opposite side of the train from the platform, and that his baggage master, with his lantern, was on the depot side of the train, aiding passengers in getting off on that side, and directing them to the depot; that the destination of many of the passengers was Bremo, and that they did not want to go to the depot; that there were lights in the depot and in the train, and the signal lights were burning; and these statements of the conductor are sustained by the brakeman and the baggage master. No witness of the defendant testifies that there was sufficient light where the plaintiff left the train to guide him in his efforts to reach the depot, nor do they testify to such a state of facts as show that this was true. Conceding that the trainmen were where they state—aiding the passengers in getting off the train, and directing them where to go—their lanterns would furnish little, if any, light, except to those in their immediate vicinity.

The crowd was very large, the night dark, and it was raining hard. Two lanterns on one side of the train, and one on the other, and that not there until after the baggage master had put off the baggage for the station. The light in the depot, from their character and location, could furnish little, if any, assistance to passengers on the rear part of the train, except to show the direction in which the depot was, and would not do that if the map put in evidence by the defendant is correct, as it shows that the two freight cars on the siding, and hereafter to be mentioned, were directly in the line of vision between the rear car and the depot.

The duties which a railway carrier of passengers owe to passengers going to and from its trains to the passenger station were considered by this court in the case of *C. & O. Ry. Co. v. Smith*, 49 S. E. 487, handed down at the last term of the court. It was

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said in the opinion of the court in that case that: "It is the duty of a railway company, for the protection of passengers carried or to be carried on its trains, to provide and maintain at its stations reasonably safe and adequate ways for approaching and leaving its trains, and at night to have such ways reasonably lighted a sufficient time before and after the arrival and departure of each train to enable passengers to avoid danger. * * * And where passengers are invited expressly or impliedly to get off a train at a place other than that at which they usually alight, and there is any special danger attending their approach to the station, it is the duty of the railway company to warn them of such danger, and to aid them in reaching the station in safety; and especially is this true in the nighttime."

Applying this rule to the facts and circumstances of this case, it is clear that the defendant did not exercise that degree of care for the protection of the plaintiff in going from its train to the station as the law imposed.

But it is insisted that the plaintiff was guilty of contributory negligence. One of the grounds relied on to show this is that, the defendant having provided a suitable and convenient platform for the purpose, it was the duty of the passenger to use it, in order to escape the imputation of negligence.

That proposition of law is, no doubt, correct, within certain limits. But the authorities relied on to sustain it show that it is based upon the fact that the passenger has knowledge of the existence of the platform, or its existence is so obvious that he must be held to have notice of it. *Shear. & Red. on Neg.* 521, in the same sentence quoted from by the defendant, say, that: "Passengers by rail should enter and leave cars by such methods as are, to their knowledge, provided for that purpose. * * * It is therefore generally, though not invariably, negligence for a passenger by rail to enter or leave on the opposite side from a landing platform. * * * But if the proper side or method of entry is not obvious, and the passenger is not proved to have had sufficient notice otherwise, he cannot be held in fault for selecting any method which is consistent with ordinary care."

The rule, as limited by the learned authors, can have no application to a case like this, where the passenger was not only without any knowledge whatever of the existence of the platform, but where the passengers on the train were getting off indiscriminately on both sides of the train, with the knowledge and assistance of the trainmen. The statement of the defendant's witness Thomas, if true—that he and the plaintiff first left the car on the platform side, and, after wandering around in the darkness and rain, got back on the car, and alighted from it on the other side—does not affect the question, for neither of them knew at that time or before the accident that there was a platform.

Upon his cross-examination the plaintiff stated that one reason why he did not get off on the other side of the train was "because there was such a rush, and that he never follows a crowd in such

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a rush as that." This, it is insisted, was evidence of contributory negligence.

Taken in the connection in which it was spoken, it does not show any want of due care on his part. He had just been told by some one that the depot was on the other side of the train. He had been directed to get off the train and go to the depot. People were getting off on both sides, and he had no reason to believe that the way to the depot from that side was any less safe than from the other. Ignorant as he was of his surroundings, he had the right to presume that the defendant company had discharged its duty in rendering both approaches safe as far as practicable. Bishop's Noncontract Law, § 1086; Brassell, etc., v. N. Y., etc., R. Co., 84 N. Y. 241.

It is further contended that, "although the plaintiff says that when he got off the train he started towards the depot, his own evidence shows that he must have started in an opposite direction, because he says that after he 'let loose the passenger train' he touched the freight cars; showing that the freight cars were confronting him as he alighted. Had he turned up towards the depot, he could never have reached the trestle and ditch, which could only have been reached by him by turning down the track away from the depot, and then going around the cars and starting towards the depot, as detailed by witness Thomas. This action was nothing short of negligence."

This contention is based upon a mistake of fact. The front end of the rear car, where the plaintiff alighted, as appears not only from the map filed by the defendant, but from the measurements made and the defendant's evidence as to the point where the train stopped, was several feet east of the east end of the freight cars standing on the depot siding over the culvert, and opposite the ditch into which the plaintiff fell. All four of the passenger cars and a small part of the baggage car were east of the depot. The aggregate length of the passenger cars was $229\frac{2}{3}$ feet. The distance from the depot to the ditch was 104 feet. Thus showing clearly that the front end of the rear car, which was 52 5-6 feet long, was more than 70 feet east of the ditch, and several feet east of the end of the freight car, whose west end was opposite the ditch, as shown by the map. The plaintiff, having gotten off the train east of the freight car, could never have reached it, except by going toward the depot. He states that when he got off his car somebody told him the depot was up the track; that he started in that direction; that after he let loose the passenger train he touched the freight car, and, holding onto it, walked upon the ties until finding that they were so rough, he thought he would get off and walk upon a path which he expected to find on the side of the track; and that when he stepped off, or after making a few steps, he went down into the ditch.

It is evident from the physical facts in the case, as well as from the plaintiff's evidence, that when he got off the train he did not go from the depot, but towards it.

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The contention is made that "the plaintiff was also negligent in attempting to cross the trestle—a feat so difficult that it had to be accomplished by his holding onto a freight car in order to get along. He says, "I held onto the train [i. e., the freight cars] as long as I could, and when I had to step off the side of the track I went down into the ditch;" and again he stated that he walked on those ties and held onto the freight cars, and that he stepped off, thinking he would get in a path, and that when he released his hold on the freight cars he fell into the ditch. He knew, therefore, that he was in a dangerous and precarious situation, and the authorities cited above are sufficient to show that he should not have undertaken to cross the trestle, when there was a safe way which he could have discovered by the exercise of due care on his part. * * *

When the plaintiff's evidence is read as a whole, it does not show that the plaintiff, when walking on the end of the ties and holding onto the freight car, knew or had the least reason to believe that he was on a trestle, or that he was in a dangerous and precarious situation; and his conduct in letting go the car and stepping off the ties to get into a path, as he supposed, when or just before he fell into the ditch, shows how entirely ignorant he was of his danger. There is not only nothing in the case to show that he knew or had any reason to believe that in walking on the end of the ties by the freight car he was in peril, but he had the right to presume, as before stated, that the defendant had discharged its duty in making the approaches from its passenger cars to its station reasonably safe. *Bishop's Noncontract Law*, § —; *Brassell v. N. Y., etc., R. Co.*, *supra*.

We are of opinion that the record does not show that the plaintiff was guilty of contributory negligence, and that, upon the whole case, no verdict other than one against the defendant company could have been rightly found. It is therefore unnecessary to consider the objections made to the instructions given and refused in the case, since a decision of those questions could not affect the result. *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Richmond P. & P. Co. v. Allen*, 103 Va. —, 49 S. E. 656, and cases cited.

The remaining assignment of error is that the damages allowed by the jury are excessive.

They do seem pretty heavy, but are not so great, under all the facts and circumstances of the case, as to furnish ground for believing that the jury were actuated by partiality or prejudice; and, unless this is so, under the well-settled rule in this state in this class of cases, the court should not disturb the verdict. *Farish v. Reigle*, 11 Grat. 697, 62 Am. Dec. 666; *Richmond Ry., etc., Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *Southern Ry. Co. v. Oliver*, *supra*.

We are of opinion, therefore, to affirm the judgment.

KEITH, P., absent.

CHICAGO, R. I. & P. RY. CO. *v.* WHEELER.

(Supreme Court of Kansas, Feb. 11, 1905.)

[79 Pac. Rep. 673.]

Negligence—Pleading.—A petition contained general averments of negligence “as hereinafter more specifically mentioned and described.” Held, that only such issues are thereby presented as are found in the specific allegations.

Instructions.—It is error to direct the jury to find upon issues not raised by the pleadings or upon the trial.

Carriage of Passengers—Negligence—Speed.*—The averment that a passenger train was running at a rate of speed of about 60 miles an hour is not per se an allegation of negligence.

(Syllabus by the Court.)

Error from District Court, Clay County; Sam Kimble, Judge. Action by Mitchell Wheeler against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error.

F. P. Harkness and Geo. L. Davis, for defendant in error.

CUNNINGHAM, J. The defendant in error, Wheeler, had judgment against the Chicago, Rock Island & Pacific Railway Company in the court below for his damages because of the killing of some cattle by a train on a crossing. Omitting the more formal portions, the negligence of the company was stated in the following words of his petition:

“That the line of railway owned and operated by the said defendant, as aforesaid, runs diagonally through and near the southwest corner of section 10, township 7, range 2 east, in the said Clay county, Kan. That there are public highways running upon and along the south and west lines of said section 10, both of which highways said line of railway intersect and cross. That on the 28th day of December, 1902, and at an hour when no trains of the defendant were due to pass said points, to wit, at about the hour of 5:45 p. m. of said day, said plaintiff, by his agent and employee, A. Morissette, Jr., was engaged in driving a large herd of cattle, consisting of about 112 head, along the highway on the south side of said section 10, thence north along the said highway on the west side of said section 10, and over and across the railroad crossings above mentioned, and, after having crossed the railroad on the south side of said section 9, and while proceeding to drive said herd over and across said railroad on the west side of said section 9, the defendant company carelessly, negligently, and willfully ran one of its trains upon and over said herd of cattle, thereby killing, maiming, and in-

*See foot-note appended to *Fitch v. Mason City & C. L. T. Co.* (Iowa), 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451.

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juring several of them, as hereinafter more specifically mentioned and described. That the train of said defendant so causing said injury and damage was about one hour late, or behind its schedule time, was running northwest at a high rate of speed, to wit, about 60 miles an hour, and the defendant's engineer in charge of said engine attached to said train, and the defendant's employees having charge and control of said train, so carelessly, negligently, and wantonly operated said engine and train while approaching said crossing on said public highway as to cause the injuries and damage herein complained of, without any fault or negligence on the part of this plaintiff or his agent or employee. That approaching said crossing from the southeast said line of railway for a distance of about three miles is practically on a straight line, and the said crossing was in plain view of the engineer, approaching from the southeast, for a long distance. That there are three highway crossings within a distance of three miles southeast from the point where the said injuries were committed, and plaintiff avers that no whistle was sounded within 80 rods from the crossing where said injuries were caused, nor was any bell rung for said crossing, nor was any whistle sounded for the highway crossing on the south side of said section 9, nor at the highway crossing next southeast of the same. That when plaintiff's said agent and employee, A. Morissette, Jr., approached said highway crossing on the south side of said section 9, and before driving said herd of cattle across defendant's railroad track at that point, he stopped, looked, and listened for possible approaching trains, and was unable to hear or see anything indicating a train approaching on said railroad from either direction. That he used like care in approaching the crossing on the west side of section 10; but defendant's said train being run at such a high rate of speed as aforesaid, and without any warning of bell, whistle, or otherwise as aforesaid, he was unable by the most diligent efforts to prevent the injuries herein set forth."

Several quite serious points are raised by the assignments of error and argued in plaintiff's brief. We choose to consider but one. The defendant below asked the court to give the following instruction: "The only allegation of negligence which you are to consider in this case is the alleged negligence on the part of this defendant that no whistle was sounded within 80 rods from where said injuries were caused, nor any bell rung for said crossing." This was refused, and instead the court gave, at the request of the defendant in error, the following instruction: "If the engineer of the defendant company could by the use of ordinary prudence see, or, seeing the stock in question on the highway crossing, without danger stop the train and avoid striking the plaintiff's cattle, he was required to do so; and, in determining whether or not he could have done so, the jury should take into consideration all the surroundings, conditions, facts, and circumstances shown by the evidence." Upon his own

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motion the court gave this farther instruction: "I instruct you that the burden of proof rests upon the plaintiff, and to entitle him to recover for the injury he sustained by this accident he must prove to your satisfaction, by a preponderance of the evidence on his part, that such injury arose from the negligence of the defendant railway company, arising directly from a failure to blow the whistle, 80 rods southeast of the crossing at which the injury occurred, or arose from a neglect by the employees of the railway company in the management of the train whereby the animals were killed, when they knew, or reasonably could have known, that they would be struck by the train, and when they could reasonably have avoided striking the animals." It is claimed that the action of the court in the above respects is erroneous, because the jury was thereby permitted to find for the plaintiff on some other theory of negligence than the failure to sound the whistle or ring the bell, as provided by the statute, which, as plaintiff in error claims, is the only negligence counted upon in the petition. The defendant in error frankly confesses that, "if the allegations of negligence contained in the petition are all excluded save the failure to blow the whistle at the crossing or crossings, the errors complained of, to wit (the action of the court relative to the above instructions), might be well founded." Construing the allegations of this petition as to the negligence relied upon most strongly against the pleader, which is the rule that must be adopted, we are constrained to hold that the most that can be said of them is that they relate only to the failure in the performance of the statutory requirements relative to the sounding of the whistle and the ringing of the bell. A general allegation is contained in the former part of the petition that the defendant company "carelessly, negligently, and willfully ran one of its trains upon and over said herd of cattle, thereby killing, maiming, and injuring several of them, as hereinafter more specifically mentioned and described," so that this general allegation of careless, negligent, and willful mismanagement must be limited to the specific matters thereafter set out. Referring to those specific matters, we find nothing in the petition specifically mentioned except the failure to sound the whistle or ring the bell 80 rods from the several crossings.

The plaintiff in error, in making up and presenting the issues, had a right to rely upon this specific statement of the claimed acts of negligence; had a right to take the plaintiff at his word, where he voluntarily limited his general allegation of negligence by the specific mention of the acts counted upon. It is true that there is an allegation that the train was running at a high rate of speed, to wit, about 60 miles an hour; but the running of a train at this rate of speed is not per se negligence, and no special reasons are assigned why at this particular time and place it amounted to negligence.

Having thus laid out the lines of their battle in the pleadings, the railroad company had a right to have the jury's attention

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confined to and its award made solely upon the issues thus tendered, and had a right to have the instructions which it asked to that end given. By its refusal to so instruct, and by its instruction permitting the jury to enlarge the field of inquiry in the giving of the other two instructions, the court erred in the prejudice of the plaintiff in error.

We are much more easily led to the conclusion that this error worked prejudice to the company from the fact that under all the evidence it is a very grave question whether the plaintiff is entitled to recover at all, by reason of the contributory negligence of his agent who was in charge of the cattle at the time the injury was inflicted. But as this case will be remanded for another trial, this and some other suggested errors are not now determined.

The judgment of the court below will be reversed, and the case remanded for further proceedings. All the Justices concurring.

LOUISVILLE & N. R. CO. v. SMITH.

(Court of Appeals of Kentucky, Feb. 9, 1905.)

[84 S. W. Rep. 755.]

Injury to Licensee in Car on Side Track—Collision—Degree of Care.*—It is the duty of railroad employees in making up a train to use ordinary care to avoid injuring a licensee, for whose use a car has been placed upon a side track, if they knew, or by the use of ordinary care can know, of the presence of such licensee in the car, and the railroad is liable for injuries to the licensee resulting from a collision caused by the act of the railroad's employees in turning cars loose on the side track without a brakeman, and without notice to the licensee, of whose presence they have or should have knowledge.

Same—Same—Contributory Negligence—Failure to Avoid Danger.—A licensee working in a car placed upon a side track could not recover for injuries sustained by a collision of other cars with the car in which he was engaged, where he knew, or by the exercise of ordinary care should have known, of the danger from the collision in time to have protected himself from injury, and yet negligently failed to take the steps necessary to secure his safety.

Setting Aside Verdict.—It is only where there is no evidence to support a verdict, or where the evidence is so flagrantly against the evidence as to intimate that it was caused by passion or prejudice on the part of the jury, that the Court of Appeals will be authorized to set it aside, in the absence of errors of law occurring upon the trial. The court will not disturb the verdict upon the mere ground that it is against the weight of conflicting evidence.

Physical or Mental Suffering—Evidence.†—Where physical or

*As to the care due licensees on railroad premises, see foot-note appended to *Means v. Southern Cal. Ry. Co.* (Cal.), 13 R. R. R. 411, 36 Am. & Eng. R. Cas., N. S., 411.

†For authorities in this series on the question whether statements of injured persons are *res gestæ*, see foot-note appended to *Williams v. Southern Ry.* (S. Car.), 12 R. R. R. 604, 35 Am. & Eng. R. Cas., N. S., 604, where all preceding authorities in this series are collected.

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mental suffering of an injured person are the proper subjects of inquiry, the usual expressions of such suffering manifested or made at the time may be admitted as original evidence.

Hearsay Testimony—Statements of Physician.—In an action for injuries, testimony of a statement made by a physician to plaintiff that it would be necessary to amputate his hand was hearsay, and inadmissible.

Pain or Suffering—Evidence.—In an action for injuries to plaintiff's hand, a dream by plaintiff that his hand would have to be amputated, and that he told his wife to put it in ice to preserve it, so that his body could all be buried together, was not competent to prove pain or suffering.

Same—Same.—In an action for injuries, testimony of statements detailing his sufferings, made by plaintiff several months after the injuries were received, was incompetent.

Trial—Argument to Jury.—In an action against a railroad for personal injuries, plaintiff's counsel in closing to the jury stated that defendant was a soulless corporation, making millions of dollars a day. He also offered to give defendant's counsel \$2.50 to let him tell the story of how defendant treated a widow in another suit against it, and further stated that he crossed the company's track every day, and knew that they ran their cars wild there, and it would be stopped if he had to bring an injunction suit to stop it. Held, that the statements were outside the record, and improper, and it was error for the trial court to merely tell the counsel that they were improper, and not to admonish the jury to disregard them.

Appeal from Circuit Court, Green County.

"Not to be officially reported."

Action by H. O. Smith against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and *W. C. McChord*, for appellant.

Henry & Woodward, for appellee.

SETTLE, J. The appellee, H. O. Smith, recovered a verdict and judgment in the Green circuit court for \$2,750 in damages for an injury to his hand, caused by the alleged negligence of appellant's servants in moving its cars. It was averred in the petition that at the time of receiving his injuries the appellee was in a closed car, which appellant had put upon its side track at Greensburg for his use, placing therein for shipment buggy rims that were being handed him by a colored boy on the ground, when the appellant's servants in charge of an engine and certain of its cars detached two of the latter from the train, and without notice to appellee negligently permitted them to be run backward, and with great and unnecessary force, against the car in which he was at work, which would have caused appellee to be thrown down, or perhaps out of the car, but for the fact that he in some sort maintained his equilibrium by suddenly throwing out his hand, but in doing so it came in contact with the car, or buggy rims, thereby greatly bruising and injuring it. The material statements of the petition were specifically denied by the answer, which interposed the further defense that appellee's injuries were caused wholly by his own negligence. The plea of

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contributory negligence was denied by reply, and upon the issues thus made the parties went into trial, with the result indicated.

It is contended by counsel for appellant that the lower court erred in refusing to give a peremptory instruction directing the jury to find for appellant. We do not think a peremptory instruction would have been proper. While the evidence as to the manner in which appellee received his injuries was conflicting, it left no doubt of the fact that appellant, for hire, put the car on the side track for his use. He was therefore a licensee, and it was the duty of appellant's servants in making up its train to use ordinary care to protect him from injury, if they knew, or by the use of such care could have known, of his presence in the car. It appears from the appellee's evidence that they knew appellee was in the car, and what he was doing, and with such knowledge, if they, without notice to him—as the evidence of appellee further conduced to show was the case—turned loose two cars on the side track without a brakeman on either, and the cars collided with that in which appellee was at work with such force as to cause his injuries, such a state of facts would seem to warrant a verdict in appellee's favor. Upon the other hand, if, notwithstanding the negligence of appellant's servants, appellee knew, or by the exercise of ordinary care could have known, of the turning loose of the cars, and of the danger to him from a collision between them and the car he was in, in time to have protected himself from injury, and yet negligently failed to take such steps as would secure his safety, he was not entitled to recover.

Much of appellant's testimony conduced to prove that appellee was familiar with the movements of appellant's trains at the place of the accident, and that on the occasion of his injuries he knew, or by the exercise of ordinary care could have known, of the approach of the cars, and of the danger of a collision between them and the one he was on, in time to have prevented his injuries. It was the duty of the jury to pass upon the evidence; and, though it was conflicting, they had the right to accept the testimony of appellee's witnesses and reject that of appellant's witnesses. This court will not invade the domain of the jury and disturb their verdict upon the ground that it is against the weight of the evidence. It is only when there is no evidence to support the verdict, or when it is so flagrantly against the evidence as to indicate that it was superinduced by passion or prejudice upon the part of the jury, that the court will be authorized to set it aside, in the absence of errors of law upon the part of the court occurring upon the trial.

We find no substantial error in the instructions. Though unnecessarily elaborate, they fairly presented all the law necessary to enlighten the jury and guide them in arriving at a verdict.

Another complaint urged by appellant is that the lower court admitted incompetent evidence in appellee's behalf upon the trial. That is, appellee was allowed to state that he had been advised

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that his injury was very bad; that Drs. Van Meter and Shively advised him that he would be compelled to have an operation performed; and he was also permitted to relate the following: "I dreamed one night that my hand was to be amputated. It troubled me a great deal how I would get my hand back again. I dreamed I told my wife to take the hand and put it in ice to preserve it, so that all of my body would be buried together." In addition to the foregoing, the court permitted appellee to prove by the witnesses George Perkins, Joe Cantrill, and Charles Mudd what he told them several months after he was injured of his suffering from the wounded hand. It seems to be well settled that, where the physical or mental suffering of a person resulting from an injury are the proper subjects of inquiry, the usual expression of such suffering manifested or made at the time may be admitted as original evidence. In *Bacon v. Charlton*, 7 Cush. 586, it is said: "Where the bodily and mental feelings of a party are to be proved, the usual and natural expression of such feelings, made at the time, are considered competent and original evidence in his favor. There are ills and pains of the body which are proper subjects of proof in a court of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady." The above statement of the law was quoted with approval by this court in *Shade's Adm'r v. Covington, etc.*, Bridge Co., 84 S. W. 733, decided February 1, 1905, and ordered to be reported. Shade's administrator sued to recover damages for the death of his intestate, caused by a fall on the ice on the defendant's bridge. The only evidence as to the manner of her fall was furnished by the statement of the intestate made to her physicians after she had been taken home, to whom she said "she had fallen on the ice on the C. & O. Bridge." It was contended that this and other declarations made to her physician in explanation of the cause of her injury, and to enable him to properly treat her, were of the *res gestæ*, and receivable in evidence as such. In discussing the admissibility of the declaration in question, the court, speaking through Judge O'Rear, said: "Here the party whose statement is offered to be proved was suffering from a physical injury. What she said to her physician as to the pain it then caused her, and the effect it had upon her senses, was necessary for him to know in order that he might intelligently treat the injury. Under such circumstances it is presumed that the party suffering will state truly how she is affected, as otherwise the medical man might be at a loss as to the remedies needful to her condition. The incentive for a fair statement is so great that the presumption is she will not hazard an untruth to better her financial condition, as by fabricating a basis of claim

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against the person charged with her injury, at the expense of her permanent health, or maybe of her life. For that reason the law allows the proof of what she said to her physician at the time of his examination as part of the *res gestæ*. What the injured party may have said to any one at the time of the injury, or so immediately after it as to be regarded part of it, as being the verbal part of a continuing occurrence, would also be admitted upon familiar grounds. What was said after the lapse of some minutes—a half hour or so in this case—to the attending physician, to aid him in determining the nature of the injury and to prescribe a remedy of treatment, is allowed as an extension of the same rule of evidence. It rests logically upon the necessity of the case. It is matter proper to be shown, and not susceptible, generally, of being otherwise proven. But it must stop with the necessity for it. It was necessary for the physician to know whether the patient was suffering, and where the pain was, and as to its character. It was also proper that he should know how the pain was inflicted, as upon that knowledge the treatment in part might depend. So it was competent to show that the patient said she had received a blow on her head (if she did say it), and how she was otherwise hurt. But it was wholly immaterial to the physician understanding what it was necessary for him to know in treating the injuries whether she fell on appellee's bridge or elsewhere, or that she fell on the ice." In the light of the foregoing authorities it is manifest that the testimony complained of in the case at bar was incompetent for any purpose. If the physician called to treat appellee's injuries expressed to him the opinion that amputation of his hand was or would become necessary, that fact would have been competent if testified to by the physician as an expert; but, coming from appellee, as it did, as a fact communicated to him by the physician, it was mere hearsay, and should have been excluded.

The admission of appellee's relation of his dream as evidence cannot be justified from any ground. It was competent for him to testify fully as to the nature and extent of his suffering, and if, at the time of the trial, the wounded hand gave him pain, he had the right to state that fact; but in reciting his dream he violated all rules of evidence. It is true certain learned writers maintain that dreams are due to the physical and mental condition of the dreamer, but we apprehend that no law-writer of note will venture to recommend, or court of last resort will hold, that dreams be admitted as evidence to prove the existence of pain or suffering.

For the reasons mentioned it is equally clear that the statements made by appellee to Perkins, Cantrill, and Mudd, several months after his injuries were received, in which he told them of his sufferings, were incompetent. They might have been allowed to testify that he suffered from the wounded hand at the times named by them, and even that he complained of pain from that member, but should not have been allowed to relate con-

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versations had with him in which he related the nature and extent of his sufferings.

We think the incompetent evidence was prejudicial to the appellant, because it unduly emphasized and enlarged appellee's injuries. We do not know to what extent it influenced the jury, and it is useless to speculate as to its effect; but there was so much of it, and it was so calculated to reach the sympathies of the jury, that it is safe to say it must have given them an exaggerated idea of appellee's injuries, and perhaps served to swell the verdict far beyond what it would have been if the incompetent evidence had not been admitted.

In the closing argument to the jury learned counsel for appellee said to them: "The defendant in this case is a soulless corporation, making millions of dollars every day. Its money is worth 150 cents on the dollar, and Heck Smith's [appellee] money is only worth 100 cents to the dollar. Notwithstanding the great wealth of this soulless corporation, it doesn't know who owns it; whether it is J. Pierpont Morgan & Co., or J. W. Gates, the great trust magnate, God Almighty only knows." At this point objection was made by appellant's counsel to these remarks of the speaker. The court thereupon told counsel for appellee that his line of argument was improper, but did not command him to desist, or admonish the jury to disregard the improper language. After being thus told by the court that his line of argument was improper, counsel for appellee, in reply to, and without rebuke from, the court, said in the presence and hearing of the jury, "That may be so, but every word of it is true, and you know it." Again, counsel for appellee made this further statement to the jury: "To show how this great soulless corporation treats widow women, a widow woman brought suit against this company down in Hart county"— At this point counsel for appellant again objected to the remarks of the speaker. The court said to counsel that his statements were not proper, but did not tell the jury to disregard them. The speaker then, facing counsel for appellant, said to him in the presence of the jury, "I will give you \$2.50 to let me tell the story." Finally counsel for appellee said to the jury, "I cross the track of this company at the depot at Greensburg every day, and I know that you run your cars wild there, and it has got to be stopped if I have to bring an injunction suit to stop it." The last statement of counsel does not appear to have been noticed by the court, though objected to at the time by opposing counsel. Exceptions were taken by appellant's counsel to the failure of the court to exclude from the jury the improper remarks of appellee's counsel. We are of opinion that the statements of counsel complained of were outside of the record, and otherwise improper, calculated to inflame the passions and excite the prejudices of the jury, and thereby induce them to disregard the evidence, and go to an extreme and unjustifiable length in arriving at a verdict. The

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trial court erred, therefore, in not admonishing the jury to disregard them.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with the opinion.

GEORGIA SOUTHERN & F. RY. CO. v. JONES (two cases).

(Supreme Court of Georgia, Jan. 28, 1905.)

[49 S. E. Rep. 729.]

Railroads—Injury to Stock—Diligence Required.*—A railroad company is liable for any damage done to persons, stock, or other property by the running of its trains, unless the company shall make it appear that its agents exercised all ordinary and reasonable care and diligence; but a charge that, "where stock is upon the track or in danger of being killed, ordinary diligence and reasonable care would require the railroad company to do all that they could to slow up or stop their train, rather than to kill the stock," is erroneous. The definition given of ordinary care imposed extraordinary diligence on the company. *W. & A. R. R. v. King*, 70 Ga. 261.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Actions by J. B. Jones against the Georgia Southern & Florida Railway Company. Judgments for plaintiff, and defendant brings error. Reversed.

R. C. Jordan, Crauford & Walker, and *John I. Hall*, for plaintiff in error.

W. E. Thomas, for defendant in error.

EVANS, J. Judgment in each case reversed. All the Justices concur.

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(Supreme Judicial Court of Maine, Feb. 27, 1905.)

[59 Atl. Rep. 1023.]

Contributory Negligence.†—No rule of law is better settled in this state than the one which declares if a person, by his own neg-

*As to the care required of those in charge of trains to avoid collisions with animals, see foot-note appended to *Nashville & K. R. Co. v. Davis* (Tenn.), 13 R. R. R. 432, 36 Am. & Eng. R. Cas., N. S., 432.

†See *Quinn v. Chicago & E. R. Co.* (Ind.), 12 R. R. R. 661, 35 Am. & Eng. R. Cas., N. S., 661; *Simmons v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454; *Baltimore & O. R. Co. v. McClellan* (Ohio), 11 R. R. R. 800, 34 Am. & Eng. R. Cas., N. S., 800; *Fleschhut v. Lehigh Valley R. Co.* (Pa.), 11 R. R. R. 755, 34 Am. & Eng. R. Cas., N. S., 755; *Chaney v. Louisiana & M. R. R. Co.* (Mo.), 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333; *Chicago*,

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ligent acts, contributes to the accident in which he is injured, he cannot recover for the injuries so received.

Setting Aside Verdict—Conflicting Testimony.—The general rule is that, when the testimony is conflicting, the verdict must stand, but a conflict of testimony cannot be said to arise simply because one witness testifies contrary to another.

Same.—The rule cannot be so construed. It means that there must be substantial evidence in support of the verdict—evidence that is reasonable and coherent, and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against opposing evidence.

(Official.)

Action by Andrew J. Moulton against the Sanford & Cape Porpoise Railway Company. Verdict for plaintiff. Motion for a new trial. Sustained.

Argued before EMERY, WHITEHOUSE, STROUT, PEABODY, SPEAR, and SAVAGE, JJ.

E. P. Spinney, for plaintiff.

Allen & Abbott, for defendant.

SPEAR, J. This is an action on the case to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in running its electric car at an unreasonable rate of speed in approaching, in the opposite direction, the plaintiff, with his team, thereby frightening the plaintiff's horse, and causing the injuries of which he complains.

No rule of law is better settled in this state than the one which declares that if a person, by his own negligent acts, contributes

etc.. R. Co. v. Lilley (Neb.), 7 R. R. R. 798, 30 Am. & Eng. R. Cas., N. S., 798; Richmond Traction Co. v. Martin's Adm'x (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817; Anderson v. Central R. Co. of New Jersey (N. J.), 7 R. R. R. 51, 30 Am. & Eng. R. Cas., N. S., 51; Barfield v. Southern Ry. Co. (Ga.), 8 R. R. R. 752, 31 Am. & Eng. R. Cas., N. S., 752; Mercer v. Southern Ry. (S. Car.), 8 R. R. R. 703, 31 Am. & Eng. R. Cas., N. S., 703; Burian v. Seattle Elec. Co. (Wash.), 1 R. R. R. 218, 24 Am. & Eng. R. Cas., N. S., 218; Georgia Southern & F. R. Co. v. Cartledge (Ga.), 5 R. R. R. 271, 28 Am. & Eng. R. Cas., N. S., 271; Doolittle v. Southern Ry. Co. (S. Car.), 1 R. R. R. 105, 24 Am. & Eng. R. Cas., N. S., 105; Kansas v. Lake Erie & W. R. Co. (Ind.), 4 R. R. R. 170, 27 Am. & Eng. R. Cas., N. S., 170; Chicago, St. P., M. & O. R. Co. v. Rossow (C. C. A.), 4 R. R. R. 940, 27 Am. & Eng. R. Cas., N. S., 940; Roberts v. Albany & N. Ry. Co. (Ga.), 1 R. R. R. 349, 24 Am. & Eng. R. Cas., N. S., 349; Georgia R. Co. v. Ivey (Ga.), 4 R. R. R. 333, 27 Am. & Eng. R. Cas., N. S., 333; note, 7 Am. & Eng. R. Cas., N. S., 305; note, 14 Am. & Eng. R. Cas., N. S., 289; Fisher v. West Virginia P. R. Co. (W. Va.), 4 Am. & Eng. R. Cas., N. S., 86; Cooper v. Georgia, C. & N. Ry. Co. (S. Car.), 16 Am. & Eng. R. Cas., N. S., 12; Little Rock & Ft. S. Ry. Co. v. Smith (Ark.), 13 Am. & Eng. R. Cas., N. S., 699; St. Louis, etc., R. Co. v. Leathers (Ark.), 4 Am. & Eng. R. Cas., N. S., 261; Willingham v. Macon & B. Ry. Co. (Ga.), 21 Am. & Eng. R. Cas., N. S., 340; Youngblood v. South Carolina & G. R. Co. (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622; McGearry v. Old Colony R. R. (R. I.), 14 Am. & Eng. R. Cas., N. S., 764; Neining v. Cowan (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 492; Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co. (Ohio), 15

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to the accident in which he is injured, he cannot recover for the injuries so received. We think the plaintiff's case comes clearly within this rule.

Admitting the negligence of the defendant—which we doubt—the evidence shows that the negligence of the plaintiff clearly contributed to the accident causing his injuries. The verdict of the jury is, of course, a very strong barrier to overcome. The general rule is that, when the testimony is conflicting, the verdict must stand. But a conflict of testimony cannot be said to arise simply because one witness testifies contrary to another. If it was so held, hardly a verdict could ever be set aside. It would be difficult to imagine a case that had been dignified with the verdict of a jury that would not present some conflict of testimony. Besides, if such were the rule, it would only be necessary to secure the evidence of a witness, however false, to hold a verdict once obtained.

The rule cannot be so construed. It means that there must be substantial evidence in support of the verdict—evidence that is reasonable and coherent, and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence, a verdict cannot stand. *Roberts v. Boston & Maine R. R.*, 83 Me. 298, 22 Atl. 174.

If the verdict is regarded as clearly and manifestly against the evidence, it will be set aside. *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92; *Gosgrove v. Kennebec Light & Heat Co.*, 98 Me. 473, 57 Atl. 841. When the evidence, viewed in the light of the circumstances surrounding the whole transaction, so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them, the verdict should be set aside. *Smith v. Ins. Co.*, 85 Me. 348, 27 Atl. 191.

In *Cawley v. La Crosse R. R.*, 101 Wis. 150, 77 N. W. 180, the court say: "If there was anything in plaintiff's evidence, standing alone, tending to show that she had passed two or three

Am. & Eng. R. Cas., N. S., 73; *Central of Georgia Ry. Co. v. Forshee* (Ala.), 18 Am. & Eng. R. Cas., N. S., 467; *Plunkett v. Central of Ga. Ry. Co.* (Ga.), 13 Am. & Eng. R. Cas., N. S., 860; *Alabama G. S. R. Co. v. Roach* (Ala.), 11 Am. & Eng. R. Cas., N. S., 869; extensive note. 12 Am. & Eng. R. Cas., N. S., 333 (negligence and contributory negligence); *Lea v. Durham & N. R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 765; *Thompson v. Northern Pac. Ry. Co.* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 651; *Whitesides v. Southern Ry. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 537; *Sutherland v. Cleveland, C., C. & St. L. Ry. Co.* (Ind.), 8 Am. & Eng. R. Cas., N. S., 424; *Henderson v. Detroit Citizens' St. Ry. Co.* (Mich.), 10 Am. & Eng. R. Cas., N. S., 812; *Southern Ry. v. Mauzy* (Va.), 20 Am. & Eng. R. Cas., N. S., 647; *Seldomridge v. Chesapeake & O. R. Ry. Co.* (W. Va.), 14 Am. & Eng. R. Cas., N. S., 639; *Cole v. Duluth, S. S. & A. Ry. Co.* (Wis.), 17 Am. & Eng. R. Cas., N. S., 749; *Sauls v. D. W. Alderman & Sons Co.* (S. Car.), 15 Am. & Eng. R. Cas., N. S., 558; *Brown v. Wilmington City Ry. Co.* (Del.), 12 Am. & Eng. R. Cas., N. S., 439.

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teams before—and we say there is not—the rule of law, often announced, that the testimony of an interested party contrary to the facts otherwise conclusively established in the case and all reasonable inference from the situation disclosed by the evidence, does not raise a conflict requiring a finding by the jury.” *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360; *Badger v. Janesville Cotton Mills*, 95 Wis. 599, 70 N. W. 687.

The plaintiff's contention in this case is that on the 16th day of March, 1903, he was driving along a public street in Kennebunk village on his way from the Boston & Maine freight depot towards his home, with a barrel of coal in his wagon; that his horse had always been perfectly kind around the electric cars; that when he had arrived at a point opposite the house of Mr. James Stone, and crossed the railroad track to the northerly side of the road, the defendant's electric car, which is alleged to have caused the accident, was coming from Kennebunkport, and was just below and beyond the curve at the foot of the hill; that the plaintiff and the defendant's car continued to approach each other until 400 feet apart, when the car swung around the curve at the foot of the hill, which gave the car the appearance, at this point, of coming head on to the plaintiff's team.

The plaintiff at this time was more than 130 yards distant from the car; yet he says his horse, hitherto safe and used to the cars, displayed great fear, pranced and stood up, and that he waved his hand to the conductor to stop, and that the conductor paid no attention; that he tried to control his horse, and did until the car was passing him, when his horse swung from the road, and in so doing the hub of the hind wheel struck a trolley pole, swinging the horse northerly across the ditch and up the bank, where the carriage struck an elm tree, throwing the plaintiff out, and severely injuring him. The defendant controverts the plaintiff's position on every point, and affirmatively asserts (1) that the plaintiff's horse was not well broken and kind, but uncertain and vicious; (2) that the plaintiff, when approaching the car was negligent in his manner of driving; (3) that his carriage did not strike an electric pole, claimed to have been negligently set too near the traveled part of the way; (4) that the car was moving up a 4 per cent. grade at a slow rate of four or five miles an hour. The weight of evidence was with the defendant upon all of these propositions, and overwhelmingly so in one or more involving the defendant's own negligence as a contributory, if not the proximate, cause of the accident.

The plaintiff was a blacksmith, and had in the hind part of his “democrat” wagon, as it is called, a barrel of coal. When he crossed the track at the top of the hill, he says he was driving his horse with his left hand, and steadying the barrel of coal with his right. This testimony of the plaintiff himself clearly indicated that, while driving along the road entirely unmolested, the barrel was unsteady, and required holding. It is not denied by the plaintiff, and is shown by all the witnesses upon this point, that

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the barrel remained in the wagon during all the escapades of the horse, including his crossing the ditch and climbing a steep bank, so that the coal was "dumped alongside of the tree on the bank," as one witness testifies and others corroborate.

In the light of these unquestioned facts the plaintiff says, at about half way between the house of Stone and the pole with which he collided he released his hold upon the barrel, and used both hands in driving his horse.

In contradiction of the plaintiff's unsupported testimony upon this point, McGovern, the motorman, and Freemont Allen, who is in no way connected with the defendant, both testify positively that when the plaintiff crossed the front of the car, an instant before his horse bolted, he was driving with his left hand, and holding the barrel of coal with his right, in just the manner the plaintiff admits he was driving at first. Upon this vital point in the case whom does the fact that the coal was not dumped until the wagon reached the tree corroborate? Because the place where dumped is a powerful physical fact bearing upon the truth of this contention. It may be possible, but it is not probable, that the barrel of coal, which would not sit in the wagon upon the wrought part of the highway without the plaintiff's hand to support it, could have remained in the wagon, unsupported, while the horse bolted across the ditch and up the bank. The fact that the barrel, under the circumstances, stayed in the wagon until it reached the tree, makes the conclusion wellnigh irresistible that the plaintiff was not only holding the barrel when he passed the car, but continued to do so until his wagon struck the tree and was partially overturned, thereby dumping the coal.

We think the testimony of the two witnesses, and that of the situation surrounding the accident, the truth of which cannot be gainsaid, conclusively prove that the plaintiff was negligent in the manner of driving his horse, and that his negligence contributed to the cause of his injuries.

The plaintiff, it will be observed by the testimony, claims that the wheel of his wagon struck an electric pole, which had been set so near the travel of the road as to constitute negligence on the part of the defendant, and that, had it not been for the proximity of this pole to the road, and his collision with it, he might have passed the car without accident, notwithstanding the fright of his horse. It is not necessary that he should prove any collision with the pole to render the defendant liable, if it was negligent as charged, and he was exercising due care. But the evidence is overwhelming that the plaintiff's carriage did not collide with the pole. This contradiction casts a doubt either upon the honesty or correctness of the plaintiff's narrative of the accident.

As it is unnecessary to pass upon the question of the defendant's negligence, the rate of speed of the car becomes immaterial except as bearing upon the fairness of the witnesses. Balch, the plaintiff's witness, says the speed was five or six miles an hour,

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and his estimate is not in serious conflict with that of the defendant's. But upon the character of the plaintiff's horse a sharp controversy arose, to which we allude in view of its bearing upon the credibility and candor of the plaintiff. He first testified to the good qualities of the horse. Then, when speaking of throwing up his hand to signal the motorman, he says: "After I threw up my hand, I took my horse—of course, I paid strict attention to the horse, as I knew him." Knew him how? Does a kind horse need strict attention? After he was injured, and suffering mental and physical pain, several witnesses testified to his declaration as to what his wife had told him in regard to using the horse, which was, in substance, "My wife told me that horse would break my bones if I didn't get rid of him." On cross-examination he denied that he made any such declaration.

"Q. Ever make any remark to this effect, or this substance: 'That my wife told me that if I didn't sell this horse it would break my neck or my leg some time?' A. No, sir; my wife didn't tell me any such words. Q. I didn't ask you that, but did you make any such remark? A. No, sir; I did not." But this remark was testified to by four witnesses, and the plaintiff on redirect undertakes to break the force of his flat contradiction of so many witnesses by what we feel obliged to call an evasion.

He was cross-examined as follows:

"Q. You remember your testimony in cross-examination when you were on before—you remember what you testified to fully? A. In regard to what? Q. Do you remember when I asked you the question in regard to making this statement of saying that your wife's name wasn't mentioned? A. I did not mention my wife's name. At what time? Q. In the cross-examination, when you were on the stand yesterday, I asked if you didn't make such a remark that your wife said so and so, and don't you remember that you said that your wife's name wasn't mentioned? A. I remember that I said that I never mentioned my wife's name; Yes. I did not. Q. You have just testified that you did mention your wife's name. A. I think not. Q. Very well. A. My wife's name is Mattie A. Moulton, if you please. Q. Then you want the jury to understand that you get around it in that way? A. Well, I understand exactly as I said it, you know. I told it exactly as I knew. I wasn't unconscious at the time. I was conscious of everything that was done. Q. I didn't know what your wife's name was. I asked you if you didn't— A. I took it that you meant my wife's name. Q. You want the jury to understand that that is the way you get around it? A. I am not trying to get around it." Direct examination resumed: "Q. You didn't call your wife by name, nor mention her name, did you? A. No sir; I did not. Q. You don't understand that you have now, when you said, 'My wife said'? A. I merely said 'my wife.' "

The original statement by the plaintiff that he did not mention his wife's name was not brought out on cross-examination, but

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upon the direct resumed. The effect, however, is exactly the same, as the plaintiff so treated it in the above examination.

It is perfectly apparent that the plaintiff, when he asserted that he did not mention his wife's name, intended to deny that he made any such statement with respect to what his wife had said, as the several witnesses had attributed to him. He undoubtedly meant that he did not mention the name "wife," and hence could not have made a statement as coming from her. This palpable evasion detracts much from the confidence to be placed in the plaintiff's whole story, especially when it comes in conflict with other consistent and apparently reliable testimony.

A full analysis, or even a summary, of the evidence is impracticable within the reasonable scope of an opinion, and would subserve no practical purpose beyond a decision in this case. The plaintiff's contention in this case is so shaken by the inherent weakness of his own testimony, and so strongly contradicted by the positive testimony of witnesses and by the situation and circumstances surrounding the accident, as to compel the conclusion that the jury erred in finding a verdict for the plaintiff.

Motion sustained.

New trial granted.

CINCINNATI, N. O. & T. P. R. R. v. BURGESS.

(Court of Appeals of Kentucky, Feb. 7, 1905.)

[84 S. W. Rep. 760.]

Killing Stock on Track—Duty to Lookout.*—In an action against a railroad company for killing stock on the track, the court properly charged that, while it was the duty of the engineer to keep a lookout ahead, he was not required to keep his eyes constantly on the track in front of him, but was only required to use reasonable diligence and caution in the discharge of such duty.

Same—Negligence—Question for Jury.—In an action against a railroad company for killing stock on the track, evidence held to require submission of the question of the railroad company's negligence to the jury.

Same—Presumption of Negligence.†—Where stock is killed on a railroad track, the law raises a presumption that the injury was due to the negligence of the railroad company.

Appeal from the Circuit Court, Scott County.

"Not to be officially reported."

Action by T. J. Burgess against the Cincinnati, New Orleans & Texas Pacific Railroad. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

*See extensive note appended to *Davis v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 188, 35 Am. & Eng. R. Cas., N. S., 188; foot-note appended to *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

†See extensive note appended to *Macon & B. R. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

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V. F. Bradley and Jno. Galvin, for appellant.*Montgomery & Lea*, for appellee.

HOBSON, C. J. Appellant's fast train going south about 9 o'clock at night ran into a lot of mules owned by appellee, killing eight and wounding another. To recover for this he filed this suit. The jury to whom the case was submitted returned a verdict in his favor for \$705, on which the court entered judgment, and the defendant appeals.

There is no complaint of the instructions of the court or of the admission or rejection of evidence. The only complaint is that the evidence does not warrant a verdict for the plaintiff, and that at the conclusion of the testimony the court should have directed a verdict for defendant. The proof for the defendant is to the effect that the mules were on a curve, and that by reason of the curve the engineer of the train could not see them until he got within 250 or 300 yards of them; that the train could not be stopped within less than a quarter of a mile; and that, after the mules were discovered on the track, everything was done which could have been done to avoid striking them. The train was furnished with an electric headlight, which was so arranged as to throw the light straight ahead on the track and where the track curved, the light would follow a straight line, and would not be thrown upon the track around the curve. If there had been no other evidence but that of the defendant, there would be great force in the argument made for it. But the plaintiff showed that the mules were struck and knocked from the track at a point only five rail lengths from the beginning of the curve and that from this point there was a plain view northward for about seven hundred yards. His proof also showed that there was blood on the ties two rail lengths north of where the mules were knocked from the track, and that for three rail lengths north of this point there were tracks of the mules cupping the ground, caused evidently from running in front of the train. If this proof was true, the mules, when they began to run, were at or about the beginning of the curve, with a straight track north of them for some distance. A rail is 30 feet long, and the distance that the mules ran before they were hit by the train running about 45 miles an hour was some evidence that the train was pretty close to them when they began to run, or that it then had entered on the straight track north of them. One of the mules was caught upon the pilot, and carried there something like 200 yards, to where the train stopped. This mule may have been the first one struck, and may account for the blood found two rail lengths north of where the other mules were knocked off. The proof for the plaintiff showed that the electric headlight lighted the place where the mules were knocked off when the train was at least 700 yards from it, and, while some of this proof is not entitled to much weight, that of the surveyor who measured the ground is of more value.

The court properly instructed the jury that, while it is the duty

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of the engineer to keep a lookout ahead of the train to see that the track is clear of obstructions, yet the law does not require that he should keep his eyes constantly on the track in front of him, but only he should use reasonable diligence and caution in the discharge of this duty. The rule in this state is that, if there is any evidence, the question is for the jury; and in cases similar to this, where the circumstances showed that the stock might, by the exercise of ordinary care, have been seen in time to avoid a collision, and warranted such a finding by the jury, this court has uniformly held that a peremptory instruction should not be given. The law raises a presumption that the injury of stock is due to the negligence of the railroad company, and this presumption cannot be said to be overthrown as a matter of law when the evidence shows such a state of facts as appears here.

Judgment affirmed.

SOUTHERN RY. CO. v. JOHNSON.

(Supreme Court of Alabama, Dec. 20, 1904.)

[37 So. Rep. 919.]

Origin of Fire—Question for Jury.—In an action against a railroad company for the destruction of property by fire alleged to have been communicated by sparks from defendant's engine, evidence held to justify submission to the jury of the question whether the fire originated as alleged.

Fires Set by Locomotive—Presumption of Negligence.*—In an action against a railroad company for damages from fire alleged to have been communicated by defendant's engine, evidence authorizing the jury to conclude that the fire had originated in this manner cast the burden upon defendant of showing a proper handling of the train and equipment of the engine.

Appeal from City Court of Bessemer; B. C. Jones, Judge.

Action by W. P. Johnson against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The averments of the complaint and the facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of the plaintiff's evidence the defendant moved to exclude all of such evidence upon the ground that it was irrelevant and immaterial, and failed to make out a case for the plaintiff. This motion was overruled, and the defendant duly excepted. The defendant requested the court to give to the jury the general affirmative charge in its behalf, and duly excepted to the court's refusal to give said charge as asked.

*See foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625; *Atchison, T. & S. F. Ry. Co. v. Geiser* (Kan.), 10 R. R. R. 92, 33 Am. & Eng. R. Cas., N. S., 92.

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James Weatherly and J. T. Stokely, for appellant.
A. O. Lane, for appellee.

TYSON, J. All the counts of the complaint except the third allege the origin of the fire to have been by the emission of sparks from a passing engine operated by defendant. The evidence relied upon to prove its origin, as alleged in the counts, was circumstantial; and if it afforded a reasonable inference upon which the jury could have predicated a determination that the fire originated by means of sparks thrown by defendant's engines, then the motion to exclude was properly overruled, and the affirmative instruction requested by defendant was properly refused. The facts proven were these: That in about 40 minutes after the passing of one of defendant's trains the fire was discovered in close proximity to the track, and that about 15 minutes before this train passed there was no agency on the premises to which the origin of the fire could be attributed. The train was traversing an upgrade at the point where the fire was discovered. From these facts we think the jury may fairly conclude that the fire originated as alleged. Nor do we think that it can be affirmed as a matter of law that their probative force was entirely destroyed or emasculated, so as to take the case from the jury, by the statement of a witness that at another and different place he saw no sparks being emitted by the engines as they passed; especially in view of the tendency of the testimony that it was daylight when he saw the engines. The evidence being sufficient to authorize the jury to conclude that the fire originated as alleged, such conclusions would cast the burden upon defendant of showing a proper handling of the train and a proper equipment of the engines. *Tinney v. Central Ry. of Ga.*, 129 Ala. 523, 30 South. 623; *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. The motion for a new trial is not insisted upon.

Affirmed.

McCLELLAN, C. J., and SIMPSON and ANDERSON, JJ., concur.

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(Supreme Court of North Carolina, Oct. 4, 1904.)

[48 S. E. Rep. 591.]

Death of Child—Action by Administrator.—Under Code, § 1498, giving a right of action for wrongful death, an action may be maintained by an administrator for the death of an infant 2½ years old.

Wrongful Death — Evidence — Photographs.* — In an action for wrongful death, photographs of the decedent, taken just before and also after the injury causing the death, are admissible.

*As to the admissibility of photographs as evidence in negligent cases, see *Smith v. Lehigh Valley R. Co.* (N. Y.), 11 R. R. R. 746, 34 Am. & Eng. R. Cas., N. S., 746 (photograph of handsome woman was

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Same—Same—Distance within Which Train May Be Stopped.†—In an action against a railroad for the death of a person resulting from being struck by a train, evidence as to the distance within which the train could have been stopped is admissible; it being a matter of common knowledge and observation, of which the jury could take notice, even without evidence.

Death of Child—Contributory Negligence of Father.‡—In an action by the administrator of a deceased infant to recover damages for the alleged wrongful death of the child, the father's contributory negligence is available as a defense.

Same—Same—Pleading.—In an action by a father, as administrator of his deceased infant child, to recover damages for its death, an answer charging the "plaintiff" with contributory negligence will be construed as charging contributory negligence on the part of the father, under Code, § 260, abolishing the old rule that the pleadings should be construed most strongly against the pleader, and requiring the allegations to be liberally construed, with a view to substantial justice between the parties.

Appeal from Superior Court, Vance County; Councill, Judge.

Action by H. A. Davis, administrator of his infant son, de-

not admissible in evidence, in action to recover compensation to husband and children for her death); *McGovern v. Smith* (Vt.), 5 R. R. R. 541, 28 Am. & Eng. R. Cas., N. S., 541 (photographs of scene of accident); *Southern Pac. Co. v. Huntsman* (C. C. A.), 5 R. R. R. 203, 28 Am. & Eng. R. Cas., N. S., 203 (photographs of wreck in which fireman was injured); note appended to *Hampton v. Norfolk & W. R. Co.* (N. Car.), 7 Am. & Eng. R. Cas., N. S., 510 (photographs of scene of accident); note appended to *Baxter v. Chicago, etc., Ry. Co.* (Wis.), 16 Am. & Eng. R. Cas., N. S., 476 (photographs of injured person, including x-ray photographs); note appended to *Baltimore City Pass. Ry. Co. v. Cooney* (Md.), 11 Am. & Eng. R. Cas., N. S., 759 (in an action against a street railway company to recover for personal injuries, no photographs of a car other than the one causing the injury is admissible, although there is evidence to show that the cars are alike); *Denver, etc., R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595 (photographs of wreck and surroundings, in action for injury to passenger); *De Forge v. New York, N. H. & H. R. R.* (Mass.), 20 Am. & Eng. R. Cas., N. S., 492 (x-ray pictures of personal injuries; and discretion of court in admitting such evidence); *Guhl v. Whitcomb* (Wis.), 20 Am. & Eng. R. Cas., N. S., 520 (nude photograph of injured woman was held not admissible); *Bash v. Iowa Cent. Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 161; *Lake Erie & W. R. Co. v. Wilson* (Ill.), 20 Am. & Eng. R. Cas., N. S., 164 (photographs of scene of accident); *Bruce v. Beall* (Tenn.), 9 Am. & Eng. R. Cas., N. S., 841 (x-ray photographs).

†As to what evidence is admissible to show the distance within which a train may be stopped, see *Schafstette v. St. Louis & M. R. R. Co.* (Mo.), 8 R. R. R. 715, 31 Am. & Eng. R. Cas., N. S., 715 (in an action against a street railway company for injuries, an ex-motorman was asked, as an expert, in what distance "he" could have stopped the car, to which he answered that "it could have been stopped" within a given distance; it was held that the error in the question was cured); *Vaniarsdell v. Louisville & N. R. Co.* (Ky.), 1 R. R. R. 61, 24 Am. & Eng. R. Cas., N. S., 61 (evidence as to time within which another train could be stopped); *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (expert testimony).

‡See foot-notes appended to *Richmond, etc., R. Co. v. Martin's Adm'r* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435.

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ceased, against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Reversed.

J. H. Bridgers and *W. H. Day*, for appellant.

A. C. Zollicoffer and *T. T. Hicks*, for appellee.

CLARK, C. J. This is an action under Code, § 1498, by the plaintiff, as administrator of his infant son, 2½ years old, who, having wandered off without the knowledge of its parents, was injured on the track of the defendant, by its train, so that the child died, and the plaintiff alleges this was by the negligence of the defendant.

The defendant, among other exceptions, excepted to a refusal to nonsuit at the close of the evidence, and asks us to overrule *Russel v. Steamboat Co.*, 126 N. C. 961, 36 S. E. 191, in which it was held that "an action may be maintained by the administrator under Code, § 1498, for the death by the wrongful act of another of an infant a few months old." That decision is fully sustained by the reasoning and authorities there set out, and meets our renewed approval.

The objection to the admission of photographs of the child just before its injury, and also thereafter, but before its death, cannot be sustained. Photographs frequently convey information to the jury and the court with an accuracy not permissible to spoken words, if their admission is properly guarded by inquiry as to the time and manner when taken. The admission of this species of evidence was, it is true, somewhat questioned (by a divided court) when presented in this court for the first time. *Hampton v. Railroad*, 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808. But they have since become a well recognized means of evidence, and are not infrequently used on trials below, and are sometimes sent up in the record on appeal, especially in actions for personal injuries.

Nor can we sustain the exception as to evidence of the distance within which the train could be stopped. *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275. Indeed, the jury can take notice thereof as a matter of common knowledge and observation, without evidence. *Wright v. Railroad*, 127 N. C. 227, 37 S. E. 221, citing with approval *Lloyd v. Railroad*, 118 N. C. 1013, 24 S. E. 805, 54 Am. St. Rep. 764, and *Deans v. Railroad*, 107 N. C. 693, 12 S. E. 77, 22 Am. St. Rep. 902.

The real point in the case is in the refusal of the court to submit the issue of contributory negligence, upon the ground that negligence would not be imputed to the infant. This is true in an action in behalf of an infant. *Bottoms v. Railroad*, 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. Rep. 799, approved in *Smith v. Railroad*, 114 N. C. 749, 19 S. E. 863, 923, 25 L. R. A. 287, and *Duval v. Railroad*, 134 N. C. 349, 46 S. E. 750. A different rule was laid down in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, known as the "New York rule"; but that ruling has been severely criticised, and has been more denied than fol-

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lowed in other states. One of the most pungent criticisms is to be found in *Newman v. Railroad*, 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842. What is known as the "English rule" was laid down in *Waite v. Railroad*, 1 E., B. & E. 719, and denies a recovery only in cases where the parent or custodian is present and controlling the infant, and negligently contributed to the injury. This is followed in this country by the Massachusetts courts alone. The doctrine generally sustained is that of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, known as the "Vermont rule," and is followed by us in *Bottoms v. Railroad*, *supra*, and which we deem still the proper rule. This latter rule has the weight of authority in judicial decisions and standard law writers: That eminent text writer, Mr. Bishop (*Noncontract Law*, § 582), criticising the New York rule, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his grandfather, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or thriftless or a scoundrel, or because any body who could be made to respond to a suit for damages was a negligent custodian of it." The subject is also discussed in Wharton, *Neg.* § 314; Beach, *Cont. Neg.* §§ 38-48, 127-130. Mr. Beach says that the New York doctrine "is an anomaly, and in striking contrast with the case of a donkey exposed in the highway and negligently run down and injured (*Davies v. Mann*), or with oysters in the bed of a river injured by the negligent operation of a vessel, in both of which cases actions have been maintained," and he adds: "If the child were an ass or an oyster, he would secure a protection denied him as a human being. He is not the chattel of his father, but has a right of action for his own benefit when the recovery is sorely for his own use." See, also, *Ward v. Odell*, 126 N. C., bottom of page 948, 36 S. E. 194. Shearman & Redfield, *Neg.* § 78, also holds that the Vermont rule "is the true rule, and is abundantly justified by the reasoning of the courts which in more than 20 states have adopted it," among them Alabama, Arkansas, Connecticut, Georgia, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Vermont, the decisions of whose courts are cited. Also 1 Fetter, *Carriers*, § 199, p. 532. These authorities hold that "although a child or idiot or lunatic may have escaped into the highway through the fault or negligence of its keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not barred of recovery. A greater degree of watchfulness is imposed on the other party, and what would be ordinary neglect in regard to one supposed to be of full age and capacity would be gross negligence as to a child or one known to be incapable of escaping danger. The child, so far as he is personally concerned,

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is held only to such degree of care as should be expected of a child of his age."

When, however, the parents are authorized, as in some states, to bring an action, their contributory negligence can then be pleaded (S. & R. Neg. § 71; *Williams v. Railroad*, 60 Tex. 205; *Westerberg v. Railroad*, 142 Pa. 471, 21 Atl. 878, 24 Am. St. Rep. 510), provided the parent be actually in fault (S. & R. Neg. § 72). The same rule applies where the parent is suing as administrator, but is also the beneficial plaintiff, or the cestui que trust of the action, as distributee of the child's estate. 3 Thompson, Neg. § 3077; Beach, Contrib. Neg. § 44; *Tiffany, Death by Wrongful Act*, § 69; *Smith v. Railroad*, 92 Pa. 450, 37 Am. Rep. 705; *Reilly v. Railroad*, 94 Mo. 600, 7 S. W. 407; *Railroad v. Freeman*, 36 Ark. 41; *Bamberger v. Railroad*, 95 Tenn. 30, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909. In *Railroad v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76, the whole subject is admirably discussed, with a full review of the authorities, and the conclusion is reached that, while the negligence of parents, or others in loco parentis, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet when the action is by the parent, or the parent is the real beneficiary of the action, as distributee of the deceased child, the contributory negligence of the parent can be shown in evidence in bar of the action. This we think the correct doctrine, though it is held otherwise in *Railroad v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718, and *Wymore v. Mahaska*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449, which maintain on entirely technical grounds that the contributory negligence of the parents is not a defense, though they are the beneficiaries of the action brought by the administrator. The underlying principle, in our view, is that no one shall profit by his own wrong, and if the father's negligence, and not that of the railroad company, was the proximate cause of the death (under the doctrine of the "last clear chance"), it would be obviously wrong to permit him to put money into his pocket for damages proximately caused by his own negligence, because sued for through an administrator (whether himself or another), yet for his benefit. In such cases the contributory negligence of the father is a defense, just as in actions brought by the father for loss of service. 1 Fetter, Carriers, § 199, pp. 534, 535; Beach, Contrib. Neg. § 131; *Tiffany, Death by Wrongful Act*, § 69; *Wolf v. Railroad*, 55 Ohio St. 530-536, 45 N. E. 708, 36 L. R. A. 812.

Under our Code (section 1478), where there is no widow, nor child, nor representative of a child, the estate of an intestate "shall be distributed equally to every next of kin who are in equal degree." The father and mother are, of course, "next of kin in equal degree." Under our former system, under which the personality of the wife became the property of the husband upon its receipt, of course, the husband was sole legatee of an infant

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child dying unmarried and without children. Const. art. 10, § 6, now provides that "all property, real and personal, to which she [a married woman] may, after marriage, become in any manner entitled, shall be and remain the sole and separate property of such female." This seems reasonably clear, and it may well be that the wife, jointly with the husband, is the beneficiary of the action brought by the administrator of an infant child in cases like this. We refrain from passing upon the point, because it is not raised in this record; but it may become pertinent in another trial. Interesting questions may arise where one parent is guilty of contributory negligence and the other is not. This point is presented in *Wolfe v. Railroad*, 55 Ohio St. 517, 536, 45 N. E. 708, 711, 36 L. R. A. 812, and *Railroad v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, in both of which it is held that "the defense of contributory negligence is available as against such beneficiaries as by their negligence contributed to the death of the deceased; but the contributory negligence of some of the beneficiaries will not defeat the action as to others who were not guilty of such negligence." Of course, as in all other cases, the preliminary question to be decided is whether there was contributory negligence of one parent (or both) which was the proximate cause of the death; i. e., whether the defendant had or not the "last clear chance" to avoid killing the intestate. *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Lassiter v. Railroad*, 133 N. C. 247, 45 S. E. 570.

The father in this case is the administrator, and the contributory negligence is pleaded as that of the "plaintiff"; but it is clear that it was meant by this plea to allege that the contributory negligence was on the part of the father. Code, § 260, abolishes the old rule that the pleadings "should be construed most strongly against the pleader," and requires "the allegations to be liberally construed, with a view to substantial justice between the parties." *Stubbs v. Motz*, 113 N. C. 459, 18 S. E. 387.

In failing, therefore, to submit an issue as to the contributory negligence of the father as prayed, there was error.

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(Supreme Court of Arkansas, July 2, 1904.)

[82 S. W. Rep. 245.]

Negligence—Instructions.—Instructions leaving it to the jury to determine the facts, and declaring that certain facts, if found, constitute actionable negligence, are proper, such facts being such that in reason and fairness there can be no difference of opinion as to the conclusion to be drawn from them.

Street Railways—Collisions with Other Users of Streets—Reciprocal Duties.*—The duty of using ordinary care to prevent the collision in a street of a team and street car is reciprocal.

*As to the mutual rights and duties of street railways and other users of streets, see foot-note appended to *Mathiesen v. Omaha St. Ry.*

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Same—Same—Negligence.—In case of collision between a team and street car, the test of negligence in the rate of speed, sounding of gong or bell, lookout to be kept, etc., in the absence of statutory regulations, is whether that was done which a reasonably prudent man should do under the circumstances.

Same—Driving Team Along Track—Duty to Lookout.—It is not negligence per se to drive a team along a street railway track; but the person so doing should keep a lookout, though not required, as matter of law, to keep a constant lookout to the rear.

Same—Collisions—Negligence—Presumptions.†—In case of collision between a street car and team there is no presumption as to whether it was caused by the negligence of the driver of the one or the other.

Same—Same—Signals.†—Failure to sound the gong or bell of a street car is not negligence as to one struck thereby, who had actual knowledge of the car's approach.

Co. (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777; foot-note appended to Haas v. New Orleans Rys. Co. (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442.

†As to whether a presumption of negligence arises from the fact of a collision between a car or train and a person on a railroad track, see foot-note appended to West Chicago St. R. Co. v. Petters (Ill.), 2 R. R. R. 612, 25 Am. & Eng. R. Cas., N. S., 612 (whether presumption of negligence from accidents on street railway tracks); Campbell v. Consolidated Traction Co. (Pa.), 1 R. R. R. 69, 24 Am. & Eng. R. Cas., N. S., 69 (presumption of negligence from injury to wagon caused by trolley car slipping backward down grade); Adams v. Wilmington & N. Electric Ry. Co. (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307 (burden of proving negligence causing injury at street railway crossing); Todd v. Philadelphia & R. Ry. Co. (Pa.), 2 R. R. R. 37, 25 Am. & Eng. R. Cas., N. S., 37 (prima facie evidence of negligence in action for injury to boy sustained in attempting to climb over train obstructing crossing); note, 10 Am. & Eng. R. Cas., N. S., 848 (crossing accidents); note, 10 Am. & Eng. R. Cas., N. S., 583 (burden of proof in actions for wrongful death); note, 12 Am. & Eng. R. Cas., N. S., 543; note, 10 Am. & Eng. R. Cas., N. S., 584 (burden of proving negligence where person is killed by running train); Louisville, St. L. & T. Ry. Co. v. Terry (Ky.), 13 Am. & Eng. R. Cas., N. S., 770 (where trespasser is found dead near track); St. Louis & S. F. Ry. Co. v. Townsend (Ark.), 22 Am. & Eng. R. Cas., N. S., 123 (action for wrongful death); Augusta Southern R. Co. v. McDade (Ga.), 12 Am. & Eng. R. Cas., N. S., 548; Gammage v. Atlanta, etc., R. Co. (Ga.), 5 Am. & Eng. R. Cas., N. S., 709; Sims v. Western & A. R. Co. (Ga.), 17 Am. & Eng. R. Cas., N. S., 756; Strom v. Georgia, R. & B. Co. (Ga.), 13 Am. & Eng. R. Cas., N. S., 849; Cederson v. Oregon R. & Nav. Co. (Ore.), 21 Am. & Eng. R. Cas., N. S., 624 (action for injury to licensee); Burr v. Pennsylvania R. Co. (N. J.), 16 Am. & Eng. R. Cas., N. S., 162; Cox v. Norfolk & C. R. Co. (N. Car.), 12 Am. & Eng. R. Cas., N. S., 390; Garrett v. Southern Ry. Co. (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 529; Heckle v. Southern Pac. Co. (Cal.), 15 Am. & Eng. R. Cas., N. S., 584; Louisville & N. R. Co. v. Victory (Ky.), 12 Am. & Eng. R. Cas., N. S., 538; Parker v. South Carolina & G. Ry. Co. (S. Car.), 6 Am. & Eng. R. Cas., N. S., 731; Rogers v. Louisville & N. R. Co. (C. C.), 12 Am. & Eng. R. Cas., N. S., 813; Tully v. Philadelphia, etc., R. Co. (Del.), 23 Am. & Eng. R. Cas., N. S., 209; McVey v. Chesapeake & O. Ry. Co. (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788 (injury to trespasser).

†See foot-note appended to Gosa v. Southern Ry. (S. Car.), 11 R. R. R. 693, 34 Am. & Eng. R. Cas., N. S., 693.

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Same—Same—Imputed Negligence.§—The contributory negligence of the driver of a private team struck by a street car is not attributable to one riding as his guest or companion, he having no authority or control over the person with whom he is riding.

Contributory Negligence—Burden of Proof.||—The burden as to proof of contributory negligence is on defendant, unless it is shown by plaintiff's evidence.

Knowledge of Plaintiff's Peril—Instructions.—In an action for collision between a team and street car, there being a question of fact whether the motorman knew, or by the exercise of ordinary care might have known, that the wagon was in a dangerous position, instructions as to the duty of the motorman in stopping, or checking the speed of the car, and ringing the gong, are erroneous in making the fact of the proximity of the wagon to the railroad track, and not the knowledge of the fact by the motorman, the criterion of his negligence.

Res Gestæ.—Statements of a witness made several minutes after a street car collision, and after the car had left, are not admissible as part of the *res gestæ*, but merely to contradict the witness.

Street Railways—Collision—Negligence—Sufficiency of Evidence.—There is no negligence on the part of the motorman of a street car, where, while the wagon with which the car collides occupies a position enabling the car to pass it, the motorman on the car approaching from the rear rings the gong, and those on the wagon can hear the warning by the exercise of ordinary care and attention, and after this the wagon is driven suddenly in front of the car, and so close to it to make it impossible to stop the car by the exercise of ordinary care and reasonable effort.

Instructions.—Each party is entitled to an instruction announcing the law applicable to the evidence as introduced in his behalf.

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by Seg Hildreth against the Hot Springs Street Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is a suit to recover damages from the appellant for personal injuries to appellee in a collision between appellant's car and the wagon in which appellee was riding when the injuries occurred. The company denied negligence, and set up contributory negligence on the part of appellee and the driver of the wagon.

The facts, stated most strongly for appellee, are as follows: Appellee, a boy nine years of age, was on a delivery wagon for a ride with the driver, and while the wagon was being driven by the driver along Ouachita avenue, one of the streets of the city of Hot Springs, upon which the street car company had a double track, a car approaching from the rear overtook the wagon, collided with it, and threw appellee to the ground under the wheel of the wagon, and inflicted on him severe and permanent personal injuries. His arm was fractured near the shoulder,

§See foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235.

||See foot-notes appended to *Coolbroth v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419.

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his wrist of the same arm was crushed, one of the fingers of his hand was mashed off, the arm from his hand almost to the elbow was mashed and bruised to the extent that the flesh sloughed off of the back of the hand up to above the wrist joint, and there was a deep, lacerated wound under the arm about the armpit. The arm and hand were left permanently deformed, and their use almost completely destroyed. The appellee, at the time, had no control of the driver or the team. The street on which the collision occurred was narrow, the space on either side of the street car track being about 15 feet, and was, at the place of collision, very much used by vehicles. The wagon on which appellee was riding came on to Ouachita avenue from a cross street, and the driver took a position near the center of the street, and near the track on which the car was running, and drove along the street parallel to the track, and so close to it that a car could not pass the wagon without striking it. The driver continued to drive along about the same distance from the track for a distance of 75 or 100 yards after coming on to Ouachita avenue, and until the collision. While so driving he did not look back to see whether any car was approaching until attracted by the noise of the running of the car, when the car was within 25 feet of the wagon, and so close that he could not get out of the way of the car before the collision. The driver, immediately after seeing the car, turned his horses to the left in an effort to pull away from the track, but before he could do so the car struck the back end of the wagon and knocked it to the left from the track, thereby throwing the front of the wagon to the right, and the horses partially across the track. The motorman did not sound the gong at all, and made no effort to check the speed of his car until about the time the car struck the back end of the wagon, when he then put on the brake by turning the crank, and stopped the car within 8 or 10 feet, and as quick as he could. The driver and appellee were sitting on the same seat in the front of the wagon, with their backs to the car, and the motorman was all the time on the front end of the car looking down the track in front of him and towards the wagon. The car was going at its usual rate of speed, and the schedule time required them to make a trip of $2\frac{1}{2}$ miles in 20 minutes, including all stops.

On the other hand, the motorman stated that he saw the wagon, and gave ample warning by ringing his gong; that the wagon, as it was going, was out of danger from the car, and that, if it had continued along the same distance from the track, the car would have passed without striking the wagon; that he took up the slack in his brake chain, and had the car in condition that he could stop at once; that he was running the car at its usual speed; that about the time he got within 6 or 8 feet of the wagon the horses turned suddenly across the track in front of the car, and he then stopped as quick as he could within 8 or 10 feet; that he had instructions to always sound the gong when wagons were

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on or near the track in front of the cars; that he sounded the gong in this case in order to apprise the driver that the car was coming, because he considered it his duty to do so under his instructions; that he did all he could to prevent the collision after he discovered the wagon in a dangerous position. There was other evidence which corroborated the statement of the motorman.

E. W. Rector, for appellant.

Wood & Henderson, for appellee.

WOOD, J. (after stating the facts). The Supreme Court of Georgia seems to have committed itself to the doctrine that trial courts have no right to tell the jury what constitutes negligence except in cases "where the law expressly requires or forbids an act to be done, or declares its performance or nonperformance to be negligence." *Mayor, etc., of Milledgeville v. Wood*, 40 S. E. 239. In the above case the court says: "We have seen that in this state negligence is a question exclusively for the jury, and that the law so carefully guards the province of the jury in this respect that even the court cannot either directly or indirectly tell the jury what facts will or will not constitute negligence." This authority is cited by appellant for the condemnation of charges 3, 4, 7, and 11 given at the instance of appellee, in which the court tells the jury that, if certain facts with reference to appellant's conduct in the running of its cars are established, the appellant is guilty of negligence. This court has not adopted the broad rule announced by the Supreme Court of Georgia. In *Railway v. Spearman*, 64 Ark. 332, 42 S. W. 406, we said: "The law fixes the standard for the conduct of reasonable, prudent, and cautious men under the circumstances of a case of this kind, and it is the duty of the court to instruct the jury as to the law, and the duty of the jury to regard the instructions of the court, and take them as the law of the case. Were it otherwise, every jury would be at liberty to fix its own standard of negligence or ordinary care, without regard to the instructions of the court as to what might be diligence or negligence." In *St. Louis & I. M. & S. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070, we said: "It is equally well settled, where the facts are undisputed, and there could not, in reason and fairness, be any difference of opinion as to the conclusion to be drawn from them, that the question of negligence or contributory negligence is one of law." See cases there cited. In *Little Rock, etc., Ry. v. Duffey*, 35 Ark. 602, this court said: "The question of negligence is a mixed one of law and fact, in the determination of which is to be considered whether an act has been done or omitted, and whether, also, the doing or omission of it was a breach of legal duty."

In *Shear. & Red. on Neg.* 11, it is said: "The law imposes duties upon men according to the circumstances in which they are called to act; and, though the law defines the duty, the question whether the circumstances exist which impose that duty upon a

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particular person is one of fact." In other words, the law predicates negligence in each particular case upon the existence or non-existence of a certain state of facts. Where there is a conflict in the evidence as to whether a given state of facts exists, the jury must settle that conflict, and find certain facts established as true, before the conclusion of law follows. It is undoubtedly the rule that where, upon certain facts being established, all prudent and reasonable men would reach the same conclusion as to the duty required, then the failure to exercise ordinary care to discharge that duty would be actionable negligence, and the court should always so declare.

This court has often approved instructions in the form complained of, leaving the jury to find what facts are established, where the facts are disputed, before they are authorized to draw the conclusion of negligence, but declaring that, if certain facts are established, culpable or actionable negligence follows as a conclusion of law. *St. Louis, I. M. & S. Ry. v. Baker*, 67 Ark. 540, 55 S. W. 941; *Railway v. Person*, 49 Ark. 182, 4 S. W. 755; *Railway v. Duffey*, 35 Ark. 602. The instructions given and request refused are voluminous, so, to conserve time and space, we will not discuss the rulings of the trial court on these seriatim, but will announce the law applicable in such cases.

The duty of ordinary care to prevent injury to persons or property from the running of street cars is reciprocal on the company operating the cars and the general public using the streets. Ordinary care is such as a man of reasonable prudence and caution would exercise under the circumstances. *Citizens' St. Ry. v. Steen*, 42 Ark. 321; *Booth, Street Ry. Law*, § 305; *A. & E. Ency. Law* (2d Ed.) p. 59, and authorities cited. The test of negligence in the rate of speed, sounding of gong or bell, lookout to be kept, etc., in the absence of statutory regulations, is measured by what a reasonably prudent man should do under the peculiar circumstances, considering the danger and injury to be apprehended and avoided. "Where a vehicle is moving on a street beside a street railway track at a safe distance from the track, the person in charge of a street car is justified in operating the car on the presumption that the vehicle will be kept at a safe distance from the track, and the street railway company cannot be held liable for a collision caused by a sudden veering of the vehicle; but, if the driver of such a vehicle is not aware of the car's approach, warnings and signals of its approach should be given, and, if the vehicle is in such close proximity to the track that the danger of collision is imminent, reasonable care in having the car under control is required of the person in charge of the car." 27 *A. & E. Ency. Law* (2d Ed.) p. 71, and authorities cited. "Motormen are required to keep a reasonably careful lookout ahead to discover pedestrians and vehicles on or approaching the tracks, so as to be able to take the proper precaution to avoid injuries." *Id.* p. 63. Where pedestrians or vehicles are seen by those operating a street car upon, alongside, or approaching the

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track, warning of the approach of the car should be given by sounding the gong or bell, or otherwise; and the failure to give such warning may constitute such negligence as to render the street railway liable for injuries resulting therefrom." *Id.* p. 64. It is not necessarily negligent to drive a vehicle along a street railway track in the direction in which cars travel upon the track, nor in the direction from which the cars will approach. But when so driving the driver should keep a lookout for cars approaching in the opposite direction, * * * and he should use reasonable diligence to ascertain the approach of cars from the rear, * * * but he is not, as a matter of law, required to keep a constant watch to the rear to discover approaching cars." *Id.* p. 74. "Where a driver of a vehicle has actual knowledge of the approach of a car from the rear, he should use reasonable diligence to leave the track, so as not to obstruct the free passage of the car." *Id.* pp. 73, 74. "In case of a collision between street car and a vehicle, there is no presumption that it was caused by the negligence of either the driver of the vehicle or the person operating the car, but the question of negligence is a matter of proof." *Id.* p. 70. "Negligence cannot be predicated on a failure to sound the gong or bell, so as to render the street railway liable where the person injured by the car had, in fact, knowledge of its approach." *Id.* p. 65. When a person who is riding as a guest or companion of another in a private conveyance is injured by the negligence of the defendant and the contributory negligence of the one with whom the injured is riding, the negligence of the latter is not imputable to the injured person, where such injured person has no authority or control over the person with whom he is riding. 7 A. & E. Ency. Law (2d Ed.) 447. The burden of proving negligence is on the plaintiff, and of proving contributory negligence is on the defendant, unless it is shown by the testimony of the plaintiff.

The above extracts taken from the American and English Encyclopedia of Law state correct principles as they have been declared and applied by the courts of this country. See authorities cited in note. The instructions of the learner trial judge were for the most part in conformity with these principles. We think the third and seventh given at the instance of the appellee, however, are erroneous. The third had reference to the duty of the motorman in stopping, or checking the speed of his car, and the seventh had reference to his duty in ringing the gong. The third fails to make it clear that it was the duty of the motorman to stop or check his car only when he knew, or might have known by the exercise of ordinary care, that the wagon was in a dangerous position. The seventh also fails to make it clear that it was his duty to ring the gong only under similar circumstances. Under the evidence, it was a question of fact for the jury as to whether the wagon was in a dangerous position, and as to whether the motorman knew, or by the exercise of ordinary care might have known, of such position. In this particular both

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instructions are obnoxious to the criticism of counsel for appellee, in that they make the fact of the proximity of the wagon to the railway track, and not the knowledge of the fact by the motorman, "the criterion by which his conduct is to be judged."

There was no error in giving instruction No. 12 at the request of appellee. The evidence showed that the statements of Mehaffey, as testified to by the witnesses named in said instruction, were made several minutes after the accident, and after the car had left the scene, and appellee had been carried from the place of accident across the street to the sidewalk, and the witnesses to whom the statements were made had traveled several blocks, after hearing of the accident, to the scene, before said statements were made. The statements of Mehaffey were not *res gestæ*, and were not only allowable for the purpose of contradicting him, and the court properly so charged.

The court was correct in its rulings upon the request for instructions on the part of appellant, except the refusal to give the one numbered 14, which is as follows: "(14) If you believe from the evidence in this case that when the wagon with which the street car collided occupied a position which enabled the car to pass in safety and without striking said wagon, and that while said wagon occupied said position, and while the car was approaching it from the rear, the motorman on said car rang the gong of said car as a warning, and that said driver and plaintiff could have heard the warning by the exercise of ordinary care and attention to it, and after said warning said wagon was driven suddenly in front of said car, and sufficiently close to it to make it impossible to stop said car by exercise of ordinary care and reasonable effort, and said plaintiff was injured by the collision which ensued, he cannot recover in this action." This instruction certainly announced the law applicable to the evidence that was introduced on behalf of appellant. It presented the converse of propositions of law that had been declared at the instance of appellee on the evidence that had been introduced in his behalf. Each side was entitled to have the law applicable to the facts, from their respective view points, presented to the jury, and there is not a fair trial unless this is done. All the judges agree that this request for instruction was correct, and should have been granted, and the majority do not find that any other instructions cover the points presented by this, or, if so, not so clearly or so well. I am of the opinion, however, that there was no reversible error in refusing this request, because instruction No. 18, given at the instance of appellant, fairly presented the law applicable to the facts from appellant's standpoint, and embraces all the propositions contained in the refused requests.

No. 18 is as follows: "You are instructed that, although you believe from the evidence that the wagon which the street car collided with was driven in front of the car for some distance near the railroad track, but in a place of safety, these facts would not, under the law, make it the duty of the motorman to stop his

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car; and if you believe said motorman rang his gong on seeing said wagon near said track, as aforesaid, so as to warn said persons on said track on said wagon that the car was approaching, he (the motorman) had a right to anticipate that the wagon would be kept out of danger and give him the right of way, and under the circumstances he would not be called upon to stop the car or to check the same until he saw the driver was ignorant of the approach of the car, and that a collision would likely occur."

A verdict for \$3,000, under the facts as they may have been found for appellee, was not excessive.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

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(Supreme Court of Indiana, June 2, 1904.)

[71 N. E. Rep. 218.]

Negligence—Legal Conclusion.—A complaint for negligence must show the existence of a duty of defendant to exercise due care toward the person injured, and a mere allegation that it was defendant's duty to do or not to do a certain act is a conclusion of law and insufficient.

Injury to Engineer—Running Car in Switch Yard without Signals—Negligence of Fellow Servant—Sufficiency of Complaint.—A complaint in an action by a locomotive engineer for injuries received by being struck by a mail car while it was being run backward in defendant's yards without proper signals being given, drawn on the theory of a common-law liability, is defective for failing to allege that the person who caused the mail car to be moved was not a fellow servant of plaintiff.

Same—Same—Sufficiency of Complaint.—A complaint in an action by a locomotive engineer for injuries received by being struck by a mail car while it was being run backward in defendant's yards without proper signals being given is defective for failing to allege facts from which it can be said that it was defendant's duty so far to apprehend the occurrence as to impose a duty to furnish certain appliances to guard against its happening.

Same—Same—Same—Absence of Air Brakes.—A complaint in an action by a locomotive engineer for injuries received by being struck by a mail car while it was being moved backward in defendant's yards, which alleges that it was defendant's duty to provide the car with an air-brake attachment, so that the car could have been stopped on the discovery of plaintiff's peril, is defective for not alleging that such appliance was one which it was practicable to operate in the manner suggested.

Same—Same—Same—Plaintiff's Position—Obedience to Rule.—A complaint in an action by a locomotive engineer for injuries received by being struck by a mail car while it was being moved backward in defendant's yards, which alleged that plaintiff had been ordered to make a trip on defendant's road, and that, in obedience thereto, he, as was his duty, took his position between the track on which the locomotive was standing and the track on which the mail car was approaching, to examine and assume control of the locomotive, is defective for failing to allege that a rule of defendant required him

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to be where he was, or for failing to set forth facts which rendered his presence there necessary.

Negligence—Violation of Ordinances.*—Municipal ordinances regulating the movements of locomotives and cars create duties, and their violation, in case of a person injured as a result of such violation, is negligence per se.

*As to whether the violation of an ordinance limiting speed of trains is negligence, see foot-note appended to *Smith v. Atlanta & C. Air Line R. Co.* (N. Car.), 9 R. R. R. 218, 32 Am. & Eng. R. Cas., N. S., 218, where all the preceding authorities in this series are collected; *Illinois Cent. R. Co. v. Eicher* (Ill.), 9 R. R. R. 226, 32 Am. & Eng. R. Cas., N. S., 226 (mere negligence in running a train faster than allowed by ordinance is not sufficient to entitle a licensee to recover for injuries caused by the excessive speed); *Chicago & A. R. Co. v. Wise* (Ill.), 10 R. R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8 (negligence to violate ordinance making gates a warning as well as an obstruction, with respect to all persons, whether they come on the street within the gates or not: *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580 (failure to comply with ordinance requiring signals to be given as negligence); *Brasington v. South Bound R. Co.* (S. Car.), 1 R. R. R. 552, 24 Am. & Eng. R. Cas., N. S., 552 (punitive damages where railroad company wantonly and recklessly fails to comply with ordinances); *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580 (right of licensee to protection of ordinance regulating speed at crossings); *Brasington v. South Bound R. Co.* (S. Car.), 1 R. R. R. 552, 24 Am. & Eng. R. Cas., N. S., 552 (violation of ordinances by railroad companies as negligence); *Selma Street & Suburban Ry. Co. v. Owen* (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97 (violation of ordinance providing that street cars shall come to a complete stop before going onto railroad crossings is negligence with respect to a street railway passenger); note, 5 Am. & Eng. R. Cas., N. S., 287 (giving signals in violation of ordinances as negligence where horses are frightened); note, 20 Am. & Eng. R. Cas., N. S., 220 (violation of ordinance limiting speed and requiring signals to be given as gross negligence); note, 18 Am. & Eng. R. Cas., N. S., 688 (liability for injuries to children as affected by failure to comply with ordinance requiring fence to be constructed); *Schneider v. Northern Pac. Ry. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 314 (contributory negligence as affected by failure to comply with ordinance requiring maintenance of gates and flagmen); *Lea v. Durham & N. R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 765 (contributory negligence in being on track in street as affected by speed in violation of ordinance); *Central of Georgia Ry. Co. v. Tribble* (Ga.), 20 Am. & Eng. R. Cas., N. S., 794 (contributory negligence may be shown in mitigation of damages partially resulting from speed in violation of ordinance); *Schmitt v. Missouri Pac. Ry. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 216 (effect of contributory negligence of boy ten years old in walking on track, in action for his death based on violation of ordinance requiring bell to be rung); *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 700 (liability for injury at crossing, question for jury where there was contributory negligence and speed in violation of ordinance); *Peterson v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 18 Am. & Eng. R. Cas., N. S., 161 (speed in violation of ordinance as affected by failure to look and listen at crossing); *Neal v. Carolina Cent. R. Co.* (N. Car.), 18 Am. & Eng. R. Cas., N. S., 51 (speed in violation of ordinance not ground for recovery where there was contributory negligence); *Jackson v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 99 (speed prohibited by ordinance must be shown to have been proximate cause of accident); *Central of Georgia Ry. Co. v. Bond*

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Same—Violation of Rule.†—A complaint for personal injuries by being struck by a car which alleges facts showing that the employee in charge of the car violated a rule of the company does not sufficiently show duty neglected.

Employers' Liability Act—Absence of Contributory Negligence—Pleading.—The employers' liability act (Acts 1893, p. 294; Burns' Ann. St. 1901, § 7083 et seq.), regulating the liability of railroads and other corporations for personal injuries to employees in the exercise of due care, is modified by Acts 1899, p. 58 (Burns' Ann. St. 1901, § 359a), entitled "An act concerning pleading and proof," and providing that in all actions for negligence it shall not be necessary for plaintiff to allege want of contributory negligence, and therefore a complaint for personal injuries under the employers' liability act need not allege that plaintiff was in the exercise of due care.

Statutes—Modification by Subsequent Enactment.—Const. art. 4, § 21, providing that no act shall ever be revised or amended by mere reference to its title, has no application to an independent enactment, though impliedly modifying prior statutes.

Negligence—Violation of Ordinance—Pleading.—Where a complaint in an action for injuries to an employee by being struck by a mail car while it was moved backward in defendant's yards alleged the negligent doing of certain acts by the employee in charge of the car, which were in violation of municipal ordinances, and averred that the injury was caused solely by the negligence of the employee in charge thereof, it was not necessary to allege that, if

(Ga.), 17 Am. & Eng. R. Cas., N. S., 757 (violation of ordinances by railroads is negligence per se); *Harrison v. Sutter St. Ry. Co.* (Cal.), 8 Am. & Eng. R. Cas., N. S., 200; *Ward v. Illinois C. R. Co.* (Ky.), 18 Am. & Eng. R. Cas., N. S., 689 (violation of ordinance limiting speed as affecting trespasser's right to recover); *Baltimore, etc., Ry. Co. v. Peterson* (Ind.), 20 Am. & Eng. R. Cas., N. S., 887 (violation of ordinance regulating the running of trains as negligence, in action for injury to employee); *Stafford v. Chippewa Val. Elec. R. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 364 (violation of ordinance requiring ringing of bell at crossings not negligence per se); *Vant v. Chicago & N. W. Ry. Co.* (Wis.), 12 Am. & Eng. R. Cas., N. S., 470 (speed in excess of ordinance does not affect contributory negligence in failing to stop, look, and listen at private crossing); *Central of Georgia Ry. Co. v. Bond* (Ga.), 17 Am. & Eng. R. Cas., N. S., 757 (it is not competent for any purpose to show that a railroad employee who has violated a municipal ordinance was ignorant of its existence; and the violation by a railroad company of an ordinance is negligence per se); *Southern Ry. Co. v. Wood* (Ky.), 15 Am. & Eng. R. Cas., N. S., 570 (ordinance limiting speed inadmissible as evidence in action for injury to stock; *Missouri K. & T. R. Co. v. McGlamory* (Tex.), 3 Am. & Eng. R. Cas., N. S., 434 (failure to ring bell within corporate limits in violation of ordinance as negligence); *Chicago & A. R. Co. v. Winters* (Ill.), 12 Am. & Eng. R. Cas., N. S., 93 (speed in violation of ordinance is prima facie negligence where passenger is injured on track); *Walters v. Chicago, M. & St. P. Ry. Co.* (Wis.), 15 Am. & Eng. R. Cas., N. S., 606 (speed in excess of ordinance does not render company liable for personal injuries unless it was the proximate cause); *Graney v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 8 Am. & Eng. R. Cas., N. S., 187 (liability for injury to child through violation of ordinance limiting speed); *Harrington v. Los Angeles R. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191 (violation of ordinances limiting speed of bicycles as contributory negligence).

†Whether railroad employees assume the risks from the violation of ordinances limiting the speed of trains or cars, see foot-note appended to *Camp v. Chicago Great Western Ry. Co.* (Iowa), 13 R. R. R. 819, 36 Am. & Eng. R. Cas., N. S., 819.

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the ordinance had been complied with, plaintiff would not have been injured.

Employers' Liability Act—Impairment of Contract—Pleading.—An allegation in a complaint by an employee, under the employers' liability act, for injuries sustained by being struck by a mail car, that plaintiff had been in the employ of defendant as engineer continuously for 27 years, does not show any such definite agreement with the parties for the future, at the time such act went into effect, as would warrant the claim that the contract of employment had been impaired thereby.

Contributory Negligence — Pleading — Instruction.—An instruction in an action by an employee for personal injuries that contributory negligence was a defense provable under the general denial, and that it was not necessary for plaintiff to offer any evidence in chief on that question, was misleading, as leading the jury to believe that the defense could only be raised by affirmative evidence offered by defendant; thus withdrawing from the jury the evidence of plaintiff on presenting his case.

Appeal from Circuit Court, Cass County; Truman F. Palmer, Special Judge.

Action by George W. Lighthouse against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

G. E. Ross, for appellant.

McConnell, Jenkines, Jenkines & Stuart, for appellee.

GILLET, J. Appellee instituted this action against appellant to recover for an injury to his person. His complaint was in four paragraphs, to each of which appellant unsuccessfully demurred. Issues of fact were joined, and there was a verdict and judgment for appellee. The errors assigned bring in question the rulings on demurrers above mentioned, the overruling of a motion made by appellant for judgment in its favor on the answers returned by the jury to interrogatories, and the overruling of appellant's motion for a new trial.

According to all of the paragraphs of complaint, appellee, who was an employee of appellant as a locomotive engineer, received his injury in the city of Logansport, during the nighttime, by being knocked down and run over by a mail car belonging to appellant, which was being run backward in appellant's yards. It is averred in said paragraphs that appellee had been ordered to make a trip upon appellant's road; "that, in obedience to said order, plaintiff, as was his duty under his employment, took his position at a point between the track on which his locomotive was standing and the track on which said mail car was approaching, for the purpose of examining, accepting, and assuming control of said locomotive, when said locomotive began to move; and that said locomotive and the mail car passed him at the same time, leaving a space of but four feet between the locomotive and car, where he might stand. It is further alleged that while appellee was occupying this position, "as was his duty to do under his employment," he was knocked down and run over by said mail

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car. The first paragraph of complaint charges that "it was the duty" of appellant to provide said car with a person stationed on the forward end thereof, as it was being moved, supplied with a proper signal light, to warn appellee and other persons using the grounds between and adjacent to appellant's tracks, and also to provide said car with an air-brake attachment, so that said car could be stopped by a brakeman upon the discovery of any one in imminent peril of life or limb from being run over by said car. It is alleged that appellant negligently and carelessly omitted to take such precautions, and that appellee was run upon and injured by reason of the negligent movement as aforesaid. The second paragraph of the complaint counts on the negligence of the engineer in control of the locomotive which was moving said mail car. He is charged with negligently moving said car backward without having a person stationed on the end thereof, so as to perceive the first sign of danger and to signal the engineer, as required by a rule of appellant. Said engineer is also charged in said paragraph with negligence in moving said car in violation of certain ordinances of the city of Logansport. It is also alleged that appellee was run over by said car as a result of the negligence pleaded. In appellee's third paragraph of complaint it is alleged that "it was the duty" of appellant's yard conductor, who had charge of said car and the locomotive attached, to take the particular precautions which we have mentioned in connection with our statement as to the first paragraph of complaint. It is further alleged that such yard conductor negligently and carelessly omitted to take such precautions, and that by reason thereof appellee was run upon and injured by said car. The fourth paragraph of complaint, like the first and third, contains a direct charge as to appellant's duty to take certain precautions; and it is further alleged that appellant employed an incompetent and inexperienced brakeman or flagman upon said car, knowing him to be incompetent and inexperienced, and that the latter omitted to take the precautions which it is alleged that it was appellant's duty to take in connection with the movement of said car, and that, as a result, appellee was run over. Each of said paragraphs is quite long, and it is but just to appellee's counsel to state that there has been no attempt upon our part to exhibit all of the details of said paragraphs. It has only been our endeavor to make such a statement concerning them as would furnish a basis for this opinion.

The first paragraph of complaint is insufficient. It is well settled that a complaint for negligence must disclose by proper averments the existence of a duty upon the part of the defendant, or of the person alleged to be negligent, where it is a case of imputed negligence, as, under an employers' liability act, to exercise care toward the person injured. *Muncie Pulp Co. v. Davis* (Ind. Sup.) 70 N. E. 875; *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Louisville, etc., R. Co.*

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v. Sandford, 117 Ind. 265, 19 N. E. 770; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299. The direct statement that it was the duty of a defendant to do or not to do a certain act is a mere conclusion of law. The rule is that facts must be alleged from which the law will imply the existence of the underlying duty. *Indianapolis, etc., R. Co. v. Foreman* (Ind. Sup.) 69 N. E. 669, and cases cited; *Seymour v. Maddox*, 16 Q. B. 326; *Brown v. Mallett*, 57 Eng. Com. Law, 598; *City of Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *West Chicago Street R. Co. v. Coit*, 50 Ill. App. 640. And see *Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. Ed. 190. In *Brown v. Mallett*, supra, the declaration charged that "thereupon it became the duty of the defendant" to do certain things. Of this, Maule, J., said: "But the allegation now in question is open to the further objection that, however directly averred, it is an averment of matter of law only, and not of matter of fact. If the words had been that the defendant became bound by law to do certain acts, it would not be questioned that that was an allegation of matter of law; and the words 'it became the duty of the defendant,' if they were to be understood as averring the existence of some duty different from that arising out of a legal obligation, certainly would not aid the declaration, inasmuch as the breach of such a duty does not give a cause of action. But if they be understood, as we think they are, as averring the existence of a legal liability, it is well established that such an averment being an averment of matter of law, will not supply the want of those allegations of matter of fact from which the court could infer the law to be as stated, so that such allegation is useless where the declaration is insufficient, and superfluous when sufficient without it." *Seymour v. Maddox*, supra, was a master and servant case, where there was an express allegation of duty. In holding that the judgment must be arrested, Lord Campbell said: "The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration, nor from the general relation of master and servant. What, then, is the effect of the positive allegation of such duty? I confess that I at first thought that where a relation from which a particular duty may arise is alleged, and the particular duty is also alleged, it might be shown in evidence that in fact such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions show that the allegation of duty is in all cases immaterial, and ought never to be introduced, for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are stated from which the duty arises. The express allegation, therefore, will not help the defect, and the declaration is bad."

Returning to the paragraph of complaint under consideration, it is first to be observed, since the paragraph in question is drawn

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on the theory of a common-law liability, that, for aught that is pleaded, the person who caused said car to be moved without having a brakeman or lookout upon it was himself a fellow servant of appellee, for whose acts or omissions appellant was not liable. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886. It devolved upon appellee to show, by proper allegations of fact, that it was a duty which belonged to the master that had been neglected. *Southern Indiana R. Co. v. Harrel*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460. As was pointed out in the case last cited, the duty of the master with respect to providing a proper place to work does not require that the master should at all times keep the place safe, as against transient perils occasioned by the negligence of other servants who are engaged in executing the details of the work. There is enough to suggest in said first paragraph that possibly appellant was delinquent in the matter of omitting to furnish proper appliances, but there is not sufficient alleged in such particular. The allegations of the paragraph do not aid us in determining whether a duty existed. There is nothing in the pleading to advise us that it was dangerous to move a car backward in the yard at that particular time without taking the precautions alleged to have been omitted. Facts are not disclosed from which it can be said that it was the duty of appellant so far to apprehend the happening of such an occurrence as to create a duty upon its part to furnish special appliances to guard against such consequences, and, as respects the airbrake attachment, it is not alleged that such appliance is one of which it is practicable to operate in the manner suggested.

In indicating that the facts disclosed do not show the existence of a duty, we are not unmindful of what is alleged as to where it was the duty of appellee to be under his contract. There are instances where the word "duty" may be used in a pleading, although perhaps not with the utmost propriety, in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the work which he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect his locomotive. In such an instance the allegation is one of ultimate fact, and is partially descriptive of what his contract was. But here it is sought to be shown that appellee was properly in a particular place, and he charges that it was his duty to be there under his contract of employment; thus attempting to characterize the contract without showing what the contract was. If a rule of the company required him to be at that particular point, the existence of the rule should have been pleaded, or, if it was necessary for him to be there in order to execute one of the details of his work, that should be alleged, or, whatever the fact might be which justified his presence at that point, it should be made to appear by an appropriate averment of fact. The attempted showing in the latter part of said paragraph as to what was the duty of appellant being insufficient, the whole burden of man-

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ifesting the existence of such duty is thrown upon the allegation that appellee took a position as it was his duty to do under his contract. The sufficiency of such allegation must be judged by the purpose that it must serve, if the paragraph is to be held good, namely, to manifest that there was a duty owing to appellee. According to the allegation, he received an order to take his locomotive upon a trip. Now, if this order, from the nature of the contract of employment, implied that he must go to, and remain at, the place where he was injured, then there was a particular duty owing appellee, as contradistinguished from a general duty which might be shown to exist toward all employees working in the yards. To manifest this particular duty, appellee attempts to construe his contract, and this effort we must characterize, having in mind the purpose that it was designed to serve, as a mere conclusion. The pleader might as well have alleged that the giving of the order to take his locomotive out upon the road implied, by virtue of his general contract of employment, that he was to assume a certain position until the time came to go upon such locomotive. In *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426, this court, in speaking of some of the cases above cited, said: "The gravamen in each of these cases was that by virtue of a contract it became the duty of the defendant to do certain things which he neglected to do, whereby the plaintiff was damaged. It did not appear from the facts stated that the duty was imposed, and it was merely held that the averment that the duty existed was alleging a conclusion of law, and not of fact. This was in accordance with a rule of pleading long and well settled."

Speaking generally of the first paragraph of the complaint, it may be said that, in a pleading, facts must be directly and positively alleged, and it is not permissible to indulge in inferences in support of the pleading, although it might be entirely legitimate to draw such inferences, had the question arisen as to the effect of evidence. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986.

The objections pointed out to the first paragraph of complaint also condemn the third and fourth paragraphs.

The second paragraph of complaint is evidently founded upon the employers' liability act (Acts 1893, p. 294, § 7083 et seq.; Burns' Ann. St. 1901). Ordinances like those pleaded in said paragraph are ordained under the police power for the protection of the public. *Pittsburg, etc., R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044. Ordinances relative to the movement of locomotives and cars create duties, and their violation, in case of a person having a right to complain thereof, following as a proximate result of such violation, is properly characterized as negligence per se. *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843,

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10 Am. St. Rep. 136; Thompson, Com. Law of Neg. §§ 10, 11, 12. And see *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Indiana, etc., Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Baltimore, etc., Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207; *Baltimore, etc., Co. v. Peterson*, supra. "An ordinance of a municipal corporation is a local law, and binds persons within the jurisdiction of the corporation." *Pennsylvania Co. v. Stegemeier*, supra; *Baltimore, etc., R. Co. v. Peterson*, supra. The violation of such an ordinance as either of these which are pleaded is a violation of law, and in such a case the law attaches its own consequences, and does not vest a dispensing power in the jury to set aside the law, as would be the case if the violation of the ordinance were treated as mere evidence of negligence. See Thompson Com. Law of Neg. § 11.

As respects the charge in said paragraph that the engineer who was engaged in moving said mail car violated a rule of the company, it will be observed that the sufficiency of said paragraph does not depend upon such allegation, as a violation of duty is otherwise shown. We may say, however, that the pleading of facts showing that a rule had been violated does not, in and of itself, constitute a sufficient showing of a duty neglected. The existence of a rule might be a factor in some cases in the making of such a showing, as in instances where the person who committed the alleged negligent act or omission had reason to apprehend that the person who was afterwards injured would be thrown off his guard by the assumption that the rule would be observed. We indulge in this observation that the case may not be presented to the jury on the second trial on the theory that the evidence of the violation of a rule necessarily shows a duty neglected.

It is next objected that said paragraph is insufficient because it fails to aver that appellee was "in the exercise of due care and diligence," as required by section 7083, supra. Appellee's counsel seeks to meet this objection by calling attention to the provisions of section 1 of the act of February 17, 1899 (Acts 1899, p. 58; section 359a, Burns' Ann. St. 1901). Omitting the enacting clause, that section is as follows: "That hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence, on the part of the plaintiff, or such other person, shall be a matter of defense, and such defense may be proved under the answer of general denial, provided, that this act shall not affect pending litigation." It does not admit of doubt that, if a cause of action is founded upon a statute, the plaintiff is not at liberty to subtract from the terms upon which the right has been accorded. *American Rolling Mill Co. v. Hullinger*

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(Ind. Sup.) 69 N. E. 460, and cases there cited; Indianapolis, etc., R. Co. v. Foreman (Ind. Sup.) 69 N. E. 669. It is clear that prior to the enactment of the act of 1899 it was essential that a person bringing an action under the employers' liability act should allege, either directly or in substance, that he was in the exercise of due care and diligence. Giving to the act of 1899 its broadest import, we must yet affirm that the statutory requirement of due care and diligence upon the part of the plaintiff is still an element in the cause of action under the act of 1893, but it is evident that we may accord to the last-mentioned act the full measure of its fundamental purpose, as an enactment increasing the responsibilities of the master, and yet hold that, as a matter of pleading, the plaintiff may have the benefit of the subsequent statute. The act of 1899, according to its title, purports to be "An act concerning the pleading and proof" in a certain class of cases, and, if the grounds of action mentioned in the act of 1893 can be said to be a sub-class of the general class with which the later enactment deals, then the relation of the two statutes is as hand in glove.

Does the statute of 1899 refer in part to the pleading and proof in actions given by the statute of 1893 for negligence causing injury to the person or death, or does such subsequent enactment refer only to a class of actions which might have been maintained prior to 1893? The condition of the employers' liability act that the plaintiff shall be in the exercise of due care and diligence is tantamount to a requirement that he shall not be guilty of contributory negligence. Indianapolis, etc., R. Co. v. Houlihan, 157 Ind. 494, 498, 60 N. E. 943, 54 L. R. A. 787. And see Baltimore, etc., R. Co. v. Little, 149 Ind. 167, 48 N. E. 862, Pittsburgh, etc., R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Baltimore, etc., R. Co. v. Peterson, 156 Ind. 364, 59 N. E. 1044. It will be observed that the statute of 1899 undertakes to regulate the pleading and proof "in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries or the death of any person." The word "all," as an adjective of number, means the whole number of; every one of. Encyclopædic Dictionary. In considering whether the statute of Merton, in which the words "omnes viduæ" were used, applied to each of the five kinds of dower, Lord Coke observed: "Quo omne dicit nihil excludit"—who says all does exclude nothing. 2 Inst. 81. We would not be understood, however, as asserting that the word, as used in legislation, is always to be understood as an all inclusive one. As so used, it is a general term, which is to be understood as comprehending whatever is within the outmost circle of the meaning of the word, unless, after subjecting the statutes to interpretation and construction, there is sufficient reason for holding that the term was not used in so broad a sense. Harrington v. Smith, 28 Wis. 43; Torrance v. McDougald, 12 Ga. 526; Phillips v. State ex rel., 15 Ga. 518; Kieffer v. Ehler, 18 Pa.

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388; *Stone v. Elliott*, 11 Ohio St. 252; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397. As indicated, there must be a reason which warrants the court in concluding that the word was not used according to its primary meaning to justify a holding that it was used in a more restricted way, for courts cannot create exceptions in the operation of statutes, but, at the most, can only recognize such exceptions as the Legislature has created. *Bank v. Dalton*, 9 How. 522, 13 L. Ed. 242; *Bradley v. Buffalo, etc., R. Co.*, 34 N. Y. 427; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54; *Greeley v. St. Paul, etc., R. Co.*, 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16. In *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 232, 61 N. E. 197, where it was claimed that the act of 1899 was unconstitutional, as containing too narrow a classification, in this court said: "The act of February 17, 1899, includes within its scope all persons, natural and artificial, against whom actions for damages may be brought on account of alleged negligence causing personal injury or the death of any person. It applies to all actions of this kind in all the courts of the state."

It is urged by appellant's counsel that repeals by implication are not favored. They are not so far in disfavor, however, as to authorize us to hold that, where the Legislature has enacted a law which purports to apply to all cases of a certain character, it did not mean what its words imply. The presumption against an intent to repeal by implication is very slight in a case where the subsequent act on its face purports to change some prior law, and if in the subsequent law it is declared that "in all actions" of a certain character a rule of pleading and of the development of the proof have been changed, we should require some more substantial reason than the one suggested for holding that such enactment did not apply to all actions falling within the class as described. It was declared by Lord Coke that, if cases "be like reason, they are in like law." Coke, Lit. 191a. So, looking to the question as to what ought to be the rule of pleading and of the development of evidence in respect to contributory negligence in personal injury cases, we are led to inquire as to whether any reason can be assigned as having moved the Legislature to distinguish in respect to such matters between common law and statutory actions. We apprehend that a reason cannot be suggested. As to both classes of actions the effect of the act of 1899, if applicable, is to relieve the plaintiff from the illogical situation of being called on to prove a negative, and to give to him the benefit of that presumption of right conduct which the law prefers to indulge concerning the acts of men.

The above considerations as to the nature of the latter enactment leads to the proposition that it is remedial in its character, and as such is entitled to a liberal construction. Upon this point the case of *Andrew v. Deshler*, 43 N. J. Law, 16, is quite applicable. It appears that a statute had been enacted in New Jersey which permitted the plaintiff, "in all actions of libel and slander," to aver that the words complained of were used in a defamatory

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sense, without resorting to innuendoes, etc. The court in the above case held that the enactment applied not only to slander of person, but also to slander of title, as the latter species of action was "not only within the words of the act, but also within the mischief to be remedied." In the application of the doctrine that remedial statutes are to be liberally construed, there is ordinarily a reaching out upon the part of the court for a meaning that lies in some degree beyond the words; but in circumstances such as now confront us, where the statute is not only remedial, but the case is wholly within the words of the enactment, and within its reason as well, we are at a loss to understand what sufficient ground can be assigned for refusing to accept the natural import of the legislative words as the efficient sign of its purpose.

Appellant's counsel, while recognizing the power of the Legislature to repeal a statute by implication, insists that, if the act of 1899 is given the meaning that we have indicated should be attached to it, the act becomes amendatory, and that an act cannot be made so to operate without complying with section 21 of article 4 of the state Constitution. The section referred to has no application to an independent enactment. *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Said second paragraph of complaint, after alleging the negligent doing of certain acts relative to the movement of said mail car, which it appears were in violation of said ordinances, and alleging the fact that appellee was injured by being run over while said mail car was being so operated, charges that his injury was caused solely by the negligence of said engineer as in said paragraph averred. In view of this, we think that it was unnecessary to show by allegation that, if the requirements of said ordinances had been observed, appellee would not have been injured. There is also sufficient alleged in said paragraph to show that appellee had not assumed the risk. *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044.

Appellant's counsel make the further objection to said pleading that, as it appears therefrom that appellee had been continuously in the employ of appellant as a locomotive engineer for 27 years, the employers' liability act is unconstitutional, as applied to such a case, as amounting to an attempt to impair the obligation of a contract. It is enough to dispose of this objection to state that it does not appear that at the time said act went into force there was any such definitive agreement between the parties for the future as would warrant the assertion that any contract right of appellant had been impaired.

We hold that the second paragraph of complaint is sufficient.

Appellant was not entitled to judgment in its favor on the jury's answers to interrogatories.

In concluding this opinion, we may properly observe that the instructions of the court on the subject of the burden of proof as respects contributory negligence was calculated to mislead the jury. The court instructed upon that subject as follows: "Con-

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tributory negligence is a matter of defense, and such defense may be proved under the general denial. This being the law of the state, it was not necessary for the plaintiff, George W. Lightheiser, to have offered any evidence whatever in chief bearing upon the question as to his negligence; he only being required to introduce evidence upon that proposition after some proof has been introduced, after which it was his right to offer evidence upon that proposition." This instruction does not indicate who is to offer the proof which is to raise the question of contributory negligence, but the general framework of the instruction was calculated to lead the jury to infer that it was only by affirmative evidence offered by the appellant that this question could be raised. The jury was first informed that contributory negligence was a matter of defense, and this was assigned as a reason why it was not necessary for appellee to have offered any evidence upon the subject in chief. The instruction then proceeds to state that plaintiff is only "required to introduce evidence upon that proposition after some proof" has been offered upon the subject (inferentially by appellant, since it took up the introduction of evidence after the appellee closed his case in chief, and as its evidence preceded the rebuttal), "after which it is in his [plaintiff's] right to offer evidence upon that proposition." The jurors, who had observed development of the evidence in the case—how at different stages one side and then the other assumed the duty of putting in evidence—could have scarcely failed to understand from the above instruction that the plaintiff was under no obligation to meet the question of contributory negligence except upon rebuttal, and that only to the extent that the affirmative evidence of the defense upon its case in chief had drawn such matter into question. The testimony of appellee upon the opening of the evidence had in reality presented the question as to his contributory negligence, and appellant was entitled to have that question, as thus presented, considered. *Indianapolis, etc., R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456.

Judgment reversed, with a direction to sustain appellant's demurrers to the first, third, and fourth paragraphs of complaint.

GULF, C. & S. F. RY. CO. v. MILLER.

(Supreme Court of Texas, Nov. 28, 1904.)

[83 S. W. Rep. 182.]

Railroads—Injury by Train of Another than the Owner—Liability—Evidence.—The presumption that the engine which struck plaintiff on defendant's track was operated by it or under its control, making it liable, is not overcome by evidence merely that it belonged to the A. Company, and was moved by its servants.

Error to Court of Civil Appeals of Second Supreme Judicial District.

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Action by J. M. Miller against the Gulf, Colorado & Santa Fe Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (79 S. W. 1109), and defendant brings error. Affirmed.

See 70 S. W. 25.

J. W. Terry and Ballinger Mills, for plaintiff in error.

Stuart & Bell and R. H. West, for defendant in error.

WILLIAMS, J. The defendant in error, who was plaintiff below, was hurt upon the track and within the switch limits of the plaintiff in error, defendant below, at Dougherty, Ind. T., by an engine which was owned by the Atchison, Topeka & Santa Fe Railway Company, and was operated by its employees over the tracks of the defendant. By the judgment now before us for revision, the defendant was held liable for the injury; the trial court having instructed the jury that the fact that the engine was owned by the Atchison, Topeka & Santa Fe Company, and was operated by its servants, would not defeat the plaintiff's action. The application for writ of error, which was granted by this court, assumed that it was shown by the evidence that, under authority of an act of Congress relating to railways in the Indian Territory, an arrangement had been made between the two companies for the "use or lease of the railroad" of the defendant by the Atchison Company, under which the latter had the right to use of the tracks, and that its locomotives and trains, in passing over them, were under its exclusive control and direction. Act Cong. June 4, 1898, c. 378, 30 Stat. 431. Such we do not find, upon further examination, to be the state of the evidence. The record is silent as to the nature of the relations existing between the two companies, except as they may be gathered from the expressions dropped from the servants who were in charge of the engine in question, while testifying about the facts attending plaintiff's injury. The conductor, engineer, fireman, and brakemen testified that they were in the employ of the Atchison Company, and that the engine belonged to it; but it further appears from their testimony that the defendant was in possession of its road, and was operating it. One of its freight trains was standing on a side track at Dougherty, and its passenger train was due there when the accident occurred. Dougherty was one of defendant's "registering stations," where the conductors of passing trains were required to register, showing "name of conductor and engineer, number of cars, and number of engine." The registering was done in defendant's station, and evidently in accordance with its regulations and for its information. The engine by which plaintiff was hurt had been brought to Dougherty over defendant's track for the purpose of hauling a gravel train of the Atchison Company over the same road to a gravel pit south of Dougherty to get gravel to be used on the Atchison Company's roadbed. As the defendant's passenger train from the south was about due, the engine was stopped at the station to register, and to ascertain if there was time, before its arrival, to

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go to a tank, also south of the station, to get water and return. Learning that there was time, the employees proceeded southward, and struck plaintiff before they passed out of the switch limits. It appears that while the engine belonged to the Atchison Company, and was operated by its servants for its benefit, it was run over defendant's road, with its consent, under its train orders sent from Cleburne, and while the road was in its own possession and under its control. All that is shown concerning the arrangement under which this was done is contained in the testimony of the trainmen, in such expressions as these: "We do not steal over on the track of the G., C. & S. F. without letting them know it. The defendant gave us authority to go. The A., T. & S. F. did. We got train orders from the defendant, G., C. & S. F. We got the orders from defendant's train dispatcher at Cleburne, I suppose. * * * I suppose the A., T. & S. F. paid the G., C. & S. F. for the use of its track. I expect the A. T. and G. C. belong to the Santa Fe Route. I expect E. P. Ripley is president of the A. T. and G. C. * * * They [the A. T. and G. C.] belong to the Santa Fe system. E. P. Ripley is president of the S. F. Pacific, the Atchison, and G., C. & S. F. * * * The A., T. & S. F. is a member of the great Santa Fe system."

We think it is clear that this evidence is insufficient to show any state of facts sufficient to exempt the defendant from liability for the injury inflicted on its track, although by an engine of another company. The case is not shown to be one in which one railroad corporation has, by a lease or other contract executed under lawful authority, surrendered to another the exclusive possession and operation of its road, nor one in which the owning corporation, while conducting its business over its road, has, with like authority, admitted another to the separate and independent use of its tracks, reserving only such control over the trains and locomotives of the other as to make their movements consistent with the operation of its own. It is therefore unnecessary that we consider the effect such arrangements would have, under the act of Congress referred to, upon the responsibility of the defendant for the negligence of the other company in the operation of its trains or engines. The evidence makes it appear only that an engine of the latter company was driven by its servants over the defendant's road with its consent, and in accordance with its orders; leaving the case open to the assumption that it had that complete control and direction of the movements of the engine while on its line which its ownership entitled and obligated it to have, in the absence of some lawful contract with the other company limiting its rights and duties in this respect.

It is a sound proposition, often applied, that the corporation shown to be owner of a railroad, in the operation of which a wrong has been done, is presumed to be in the possession and operation of its road. *Ferguson v. Wisconsin Cent. Ry. Co.* (Wis.) 23 N. W. 123; *Walsh v. Railway Co.* (Mo. Sup.) 14

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S. W. 873; *Peabody v. Oregon, etc., Ry. Co.*, 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823. The fact that the defendant was operating its road is not left to presumption, but is conceded; and the contention is then made that it was not operating this engine, merely because it belonged to, and was in the immediate charge of the servants of, another corporation. But these facts do not tend to show that those servants, while on defendant's line, were not completely under its control; and the other evidence, so far as it goes, tends to show that they were. The presumption to which we have referred puts upon the owner of a railway, on which an injury has been inflicted by moving cars, the burden of showing at least that such cars were not operated by it or under its control; and this presumption is not repelled by mere proof that they belonged to, and were moved by servants of, another. The defendant is therefore as fully responsible to plaintiff for the injury inflicted in the moving of this engine as it would have been, had it belonged to it, and been in charge of its own servants. In this state of the evidence, it would be out of place to enter upon a consideration of the questions that would arise, had it been shown that the defendant, under authority of the act of Congress, had made some such an arrangement as those we have referred to above.

We cannot hold that there was no evidence of negligence on the part of those operating the engine, nor that the evidence conclusively established contributory negligence on the part of the plaintiff. Other points urged for reversal were properly disposed of in the court below.

Affirmed.

THOMAS *et al.* v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Oct. 15, 1904.)

[48 S. E. Rep. 683.]

Railroads—Injury to Person at Crossing.*—One who deliberately goes upon a railroad track in front of an approaching train, thinking that she can cross before the train reaches her, and miscalculating its speed because she is in front of it, cannot recover for injuries resulting from being run down by the train, although the company's

*As to the combined effect of contributory negligence and negligence with respect to speed of train at crossing, see *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294; *Heebe v. New Orleans & C. R., L. & P. Co.* (La.), 11 R. R. R. 763, 34 Am. & Eng. R. Cas., N. S., 763; *Reno v. St. Louis & Suburban Ry. Co.* (Mo.), 11 R. R. R. 346, 34 Am. & Eng. R. Cas., N. S., 346; *Moore v. Lindell Ry. Co.* (Mo.), 8 R. R. R. 46, 31 Am. & Eng. R. Cas., N. S., 46; *Day v. Boston & M. R. R.* (Me.), 6 R. R. R. 626, 29 Am. & Eng. R. Cas., N. S., 626; *Sego v. Southern Pac. Co.* (Cal.), 5 R. R. R. 32, 28 Am. & Eng. R. Cas., N. S., 32 (wilfulness and wantonness in running train at an excessive speed and contributory negligence in attempting to cross in front of train); *Neal v. Carolina Cent. R. Co.* (N. Car.), 18 Am. & Eng. R. Cas., N. S., 51; *Davis v. Con-*

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servants may have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road which crossed the track between the place where the train was when first seen by the plaintiff and the point at which the injury occurred. The above facts being set out in a declaration, a demurrer thereto was properly sustained; for it is clear, from the allegations made, that the plaintiff, by the exercise of ordinary care, could have avoided the injury. See *Hopkins, Pers. Inj.* § 77; *Central R. Co. v. Smith*, 3 S. E. 397, 78 Ga. 694; *Southern Ry. Co. v. Blake*, 29 S. E. 288, 101 Ga. 217; *Hopkins v. Southern R. Co.*, 35 S. E. 307, 110 Ga. 85.

(Syllabus by the Court.)

Error from City Court of Waynesboro; Phil P. Johnston, Judge.

Action by Orin Thomas and others against the Central of Georgia Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Brinson & Davis, for plaintiffs in error.

Lawton & Cunningham and *S. H. Jones*, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

GREEN v. LOS ANGELES TERMINAL RY. CO.

(Supreme Court of California, March 21, 1903.)

[76 Pac. Rep. 719.]

Accident at Crossing—Contributory Negligence.—A woman of mature age, in full possession of her faculties, approached defendant's track on foot by daylight at a point from which it was plainly visible for a distance of 800 feet to the eastward, beyond which it made a curve. When 30 feet from the track, she looked towards the east, and immediately advanced along a path which crossed the track at an angle of 30 degrees. She did not again look up, and when in the act of stepping on the track, was struck by a locomotive approaching from the east, and which she had probably not seen before as it had not, at the time she looked, rounded the curve. Held, that she was guilty of contributory negligence in law.

Same—Same—Excessive Speed—Duty to Look for Train.*—Where there is no law or ordinance restricting the speed of trains to any particular rate, a reasonably careful person in crossing a track should guard himself from the consequences of a train's running at an excessive speed by looking, when about to pass from a position of safety to a position of danger.

cord & M. R. R. (N. H.), 19 Am. & Eng. R. Cas., N. S., 68 (speed prohibited by company's rules, evidence admissible as tending to show absence of contributory negligence); *Vant v. Chicago & N. W. Ry. Co.* (Wis.), 12 Am. & Eng. R. Cas., N. S., 470 (speed in excess of ordinance does not affect contributory negligence in failing to stop, look and listen at private crossing); *Peterson v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 18 Am. & Eng. R. Cas., N. S., 161 (failure to stop, look and listen as affected by speed in violation of ordinance).

*See preceding case and foot-note.

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Contributory Negligence and Negligence after Discovered Peril.†—One may recover damages for an injury caused by negligence notwithstanding the negligence of the person injured exposed him to the risk of injury, where such injury was more immediately caused by the omission of the wrongdoer, after becoming aware of the danger of the person injured, to use ordinary care for the purpose of avoiding injury.

Doctrine of Last Clear Chance — Application — Concurrent Negligence.‡—The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff's danger, and that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury, but has no application to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it.

Accident at Crossing—Assumption That Person Will Avoid Danger.§—A locomotive engineer has the right to assume that one approaching a crossing has taken the precautions which the law requires him to take to insure his own safety, and that he is aware of the situation, and will remain in a place of safety, and the mere fact that he gives no evidence of a knowledge of the approach of the train does not indicate to the engineer that he is about to pass in front of it.

Same—Same.§—One approaching a railroad track is not in a position of peril, so as to charge the engineer of an approaching train with notice thereof, and with the duty of using every exertion to avoid injuring him, until he steps upon the track.

Same—Duty of Engineer after Discovery of Peril.—Where, immediately after a person approaching a railroad track stepped upon the track, the engineer did all in his power to avert the accident, blowing the whistle, applying the air brakes, and reversing the engine, but without avail, he did all that the law required of him.

Beatty, C. J., and Van Dyke, J., dissenting.

In Banc. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Joseph Green against the Los Angeles Terminal Railway Company. From a judgment in department (69 Pac. 694) affirming a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Goodrich & McCutchen and Gibson, Thomas & Halsted, for appellant.

R. A. Ling and Edwin A. Meserve, for respondent.

BEATTY, C. J. The plaintiff recovered a judgment for \$5,000 as damages for the death of his wife, caused, as he alleges, by the negligence of defendant's employees in the operation of a loco-

†See foot-note appended to *Louisville & N. R. Co. v. Vanarsdell's Adm'r* (Ky.), 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1; foot-note appended to *Richmond P. & P. Co. v. Gordon* (Va.), 11 R. R. R. 260, 34 Am. & Eng. R. Cas., N. S., 260.

‡See foot-note appended to *Richmond Traction Co. v. Martin's Adm'r* (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817.

§Right of trainmen to presume that person on or near track will avoid danger, see foot-note appended to *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737; foot-note appended to *Petty v. St. Louis, etc., R. Co.* (Mo.), 11 R. R. R. 252, 34 Am. & Eng. R. Cas., N. S., 252; foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

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motive and train of cars within the corporate limits of the city of Los Angeles. The case was tried by the court without a jury, and the appeal is from the judgment and from an order denying a new trial.

The evidence, though sharply conflicting, is sufficient to support the findings of the superior court that the train, considering the locality, was moving at the time of the accident at an excessively high and dangerous rate of speed (between 25 and 30 miles an hour), upon a descending grade, without steam, making but little noise, and without giving any of the statutory and customary signals by sounding its whistle or ringing its bell. But neither the evidence nor the specific findings of the court sustain the more general finding to the effect that plaintiff's wife, in approaching the track of defendant at the place where she was killed, "used ordinary care, and did that which an ordinary prudent person would have done under the circumstances, and did not by her own carelessness or negligence in any wise contribute to said accident or injury." The deceased was a woman of mature age, in good health, and in full possession of all her faculties. She approached the track of defendant on foot, and by daylight, at a point from which it was plainly visible to a distance of 800 feet to the eastward, beyond which it made a curve to the north. When 30 feet distant from the track, she was seen to look towards the east, and then immediately advance along a path which crossed the track at an angle of 30 degrees. As the track extended nearly east and west, and her course was from southeast to northwest, this caused her face to be turned partly away from the train, which was approaching from the east. It is to be inferred that when she looked towards the east from the point 30 feet distant from the track the train had not rounded the curve, and was out of view; for she advanced slowly along the path, without again looking up, and when in the act of stepping on the track was struck by the locomotive and killed.

Under these circumstances it is clear, in view of numerous decisions of this court, and of the great weight of authority elsewhere, that she cannot be acquitted of culpable negligence directly contributing to the fatal result. While it is true that negligence is ordinarily a question of fact, it is in some cases a conclusion of law. In the case of *Herbert v. Southern Pacific Co.*, 121 Cal. 230, 53 Pac. 651, Justice Temple, delivering the opinion of the court, after laying down the general rule, stated the exception as follows: "But cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and, if any element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care, as well as the nature of it, has been settled."

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To illustrate this view, he proceeds as follows: "The railroad track of steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case must depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precaution." The language here quoted from one of our own decisions is strictly applicable to the present case. If plaintiff's wife had taken the precaution to look, and had availed herself of every opportunity she had to look for the approaching train, she need not have been injured, and we are not obliged to resort to any presumption to establish her failure to take the required precaution, for the evidence and the findings show that, after looking along the track toward the east once when she was 30 feet distant therefrom, she did not look again, but, turning her face in an opposite direction, walked so slowly that the train coming from a point beyond her view at the time she looked could travel over 800 feet while she was covering the 30 feet between her point of observation and the nearest rail of the track. The only answer of the respondent to the claim that this was negligence per se is that the precaution she took would have been entirely sufficient if the train had not been running at a reckless rate of speed, and that she had a right to assume that it would only move at a lawful and proper rate. But this argument also is answered by the *Herbert Case*, where Judge Temple, commenting on a similar contention, says: "The defense of a contributory negligence implies that the defendant may have been guilty of such negligence as would justify a recovery by plaintiff if he were not also in default." There is, in other words, no occasion for the application of the rule as to contributory negligence, except in cases where it is shown or assumed that the defendant has been guilty of actionable negligence. When such negligence is not shown, he is for that reason alone free from any liability, and only when it is shown has he any occasion to exonerate himself by proof of contributory negligence on the part of the plaintiff. It is no excuse, therefore, for plaintiff's wife that the train was running faster than was proper at that point. There was no law or ordinance restricting its speed to any particular rate, and if, as the trial judge concluded, the speed was, under the circumstances, excessive, a reasonably careful person would have guarded himself from the consequences of such negligence by the easy and simple precaution of looking when about to pass from a position of safety to a position of danger. A person on foot, in possession of all his faculties, and in complete control of his own movements, stepping on a railroad track immediately in front of a train which has been moving 800 feet at a speed of less than 30 miles an hour, in full view, is clearly guilty of negligence. Upon this point the case of *Holmes v. S. P. Co.*,

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97 Cal. 167, 31 Pac. 835, is conclusive authority. There it was said: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation, is negligence per se." This statement of the doctrine of negligence per se, made 10 years ago, was based upon several decisions of this and other courts cited in the opinion of Justice De Haven, and the rule has been applied in a number of more recent cases decided here. See *Herbert v. So. Pac. Co.*, 121 Cal. 227, 53 Pac. 651; *Bailey v. Market Street C. Ry.*, 110 Cal. 329, 42 Pac. 914; *Lee v. Market St. C. Ry. Co.*, 135 Cal. 295, 67 Pac. 765; *Green v. So. Cal. Ry. Co. (Cal.)* 70 Pac. 926; *Warren v. So. Cal. Ry. Co., Id.*, and cases cited.

In other jurisdictions the same doctrine has been frequently applied in cases closely resembling the present. These decisions have been cited in the briefs of counsel, and it is unnecessary to repeat the citations here, but we will quote the language used by the judges in one or two instances in discussing a state of facts substantially the same as those which we have before us. Commenting upon a case in which the injured party had looked for an approaching train when some distance from the track, and had then driven on without again looking, the Supreme Court of New Jersey says: "If risk is inherent in a continuing state of things, the duty to exercise reasonable care is a continuing obligation. This at least must be true that a man is negligent who attempts to drive across a railroad line after listening and looking only once toward a quarter from which a train may approach, if these acts of attention and observation are performed when the observer is so far from the crossing that, before he will reach it, a train coming from that quarter, and open to his further attention and observation, has time to advance so as to endanger him." After citing several decisions to the same effect, the court proceeds: "These opinions show that persons who cross railroad tracks either on foot or in vehicles are strictly held to the duty of careful observation and attention. In each of these cases the plaintiff was injured notwithstanding some care on his part. In each case a judgment of nonsuit was sustained. In each case the effect in plaintiff's cause of action was the same. The defect was that, though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety." *Winter v. New York R. R. Co.*, 66 N. J. Law, 677, 50 Atl. 339. In *Georgia Ry. Co. v. Forshee*, 27 South. 1010, the Supreme Court of Alabama says: "It is equally clear, on principle and authority,

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that this duty must be performed at such time and place with reference to the particular situation in each case as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened and his attempt to proceed across the track. If he stops so far from the railway as that a train which could not be seen from that point could and does reach the crossing by the time he has traversed the intervening distance and gotten on the track, he negligently contributes to the resulting collision and injury; and the same is true if, though he stop at the track, he lingers there after looking and listening, and delays crossing until a train not in sight or hearing when he stopped, looked, and listened has come meantime upon the scene, and collides with him when he does attempt to cross." The Court of Appeals of New York, speaking of the duty of a person about to cross a railroad track, says: "To be sure, the statute requires a railroad company to give specified warnings, but it neither takes away a man's senses nor excuses him from using them. The danger may be there. The precaution is simple. To stop, to pause is certainly safe. His time to do so is before he puts himself in the very road of casualty." *Wilds v. Ry. Co.*, 24 N. Y. 430. The Supreme Court of Minnesota says: "We are unable to find in the record any excuse for the intestate's disregard of his obvious duty to himself to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track. Until then he had full control of his movements. He could, by the slightest move of his head towards the east, have discovered his hazard, and by the slightest check of his movements have avoided the same." *Olson v. Northern Pac. R. Co.*, 84 Minn. 258, 87 N. W. 843.

In all of the cases from which the foregoing quotations have been made, and in many others cited in the briefs, the negligence charged against the defendant, and proved or assumed for the purpose of the decision, was excessive speed in the movement of trains, or omission of customary signals by sounding the whistle or ringing the bell—the same character of negligence, that is to say, which plaintiff contends excused his wife from looking a second time for the approach of the train. They therefore sustain both propositions laid down by Justice Temple in the Herbert Case as stated above, and, in the absence of more direct authority to be found in our own decisions, would warrant us in holding, if the question were a new one, that if a person who with his eyes open steps upon a railroad track immediately in front of a moving train visible from a point 800 feet distant from the point of collision is necessarily, and as matter of law, guilty of contributory negligence.

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But this case presents another feature involving other questions material to its determination. The trial court found, among other things: "That said train was controlled and stopped by air brakes operated by the engineer on said engine, and which were in good working order. That said train was being run and operated in a very dangerous and grossly negligent and careless manner as to its rate of speed and failure to sound ordinary signals of warning. As said train rounded said curve and came upon said Humboldt street, going at a high and dangerous rate of speed, down hill, no bell on the engine thereof being rung, or other warning of its approach being given, the engineer in charge of the engine on said train saw said Bessie Green, and knew that she was walking on said path, and crossing said Humboldt street ahead of said train, and that she gave no evidence of knowledge of the approach of the train. That, notwithstanding such facts, said engineer did not slacken or lessen the speed of said train or attempt to give said Bessie Green warning of its approach. That as and just after said train crossed said avenue 23, going towards said Bessie Green, and at such high rate of speed, said engineer still saw said Bessie Green, and still saw and knew she was advancing upon said track, and that she still gave no evidence of knowledge of the approach of said train, but said engineer still did not lessen the speed of said train, or blow a whistle, or ring a bell, or give other warning of the approach of said train, nor was any given until the train was within 10 or 15 feet of the point of the accident. That said engineer could have stopped said train at any time within 200 feet after starting to do so. That when within 10 or 15 feet from the place of such accident the engineer blew the whistle, applied the air brakes, and reversed the engine, and did all in his power with the appliances he had to stop the train, and the fireman rang the bell." The rule of law applicable to the facts thus found is settled by a series of decisions of this court. In the most recent of these cases (*Lee v. Market St. Ry. Co.*, 135 Cal. 295, 67 Pac. 765) it is briefly stated as follows: "One having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in a position of danger by his own negligence." This is almost a literal quotation from Justice Van Fleet's opinion in *Fox v. Oakland Con. St. Ry.*, 118 Cal. 62, 50 Pac. 27, 62 Am. St. Rep. 216, where, in support of the rule, a number of cases are cited from our own Reports, including *Esrey v. So. Pac. R. R. Co.*, 103 Cal. 543, 37 Pac. 501, in which case the rule is thus stated: "He who last has a clear opportunity of avoiding the accident by the exercise of proper care to avoid injuring another must do so." In section 99 of *Sherman and Redfield on Negligence* it is said: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of

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plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him." This proposition is further amplified in the section cited, and the text is supported by a long array of decided cases. See, also, Cooley on Torts, 674. The essence of the doctrine seems to be that contributory negligence of the plaintiff is not a defense in action of this character unless it is the proximate cause of the injury, and it is not such proximate cause when the defendant, after becoming aware of the danger plaintiff is in, or is evidently about to place himself in, could avert the consequence by the exercise of reasonable care. This sound and wholesome doctrine applies even in cases where no previous negligence on the part of the defendant has contributed to lull the plaintiff into a false security, and a fortiori, it would have controlling force in a case like the present, where, as found by the court, the defendant was moving its train at an excessive and dangerous speed along a street of the city of Los Angeles without sounding bell or whistle, and without the use of steam. According to the finding of the court the engineer became aware of the danger into which plaintiff's wife was running, and might easily have avoided the collision by slackening the speed of the train, or by warning her of her danger by giving the signals which, under the law, it was his duty to give.

Upon this ground the judgment and order of the Superior Court are sustainable, and upon this ground they are affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

On Rehearing.

(April 13, 1904.)

LORIGAN, J. This action is brought by plaintiff to recover damages for the death of his wife, alleged to have been occasioned through the negligent operation of a locomotive and train of cars, by the employees of defendant, within the corporate limits of the city of Los Angeles. The case was tried by the court without a jury, and the judgment rendered in favor of plaintiff for \$5,000. This appeal is from the judgment, and from an order denying defendant's motion for a new trial. These were both subsequently affirmed by this court in banc, but, a rehearing having been granted, the matter is now again before us for disposition.

In our judgment, the sole point involved is whether the plaintiff's intestate was guilty of such contributory negligence as precludes a recovery by plaintiff, and we think that this point is fully presented, and is to be disposed of, under the findings of the lower court made in the case. This matter was very fully discussed in the former opinion of this court, above referred to, in considering the general finding of the lower court that plaintiff's wife had used ordinary care and prudence, and had not been guilty of carelessness or negligence contributory to the accident in which she lost her life. We are entirely satisfied with the views there expressed upon the doctrine of contributory negligence as applied to the general finding, and readopt them. In this respect that opinion declared:

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“The evidence, though sharply conflicting, is sufficient to support the findings of the superior court that the train, considering the locality, was moving, at the time of the accident, at an excessively high and dangerous rate of speed [between 25 and 30 miles an hour], upon a descending grade, without steam, making but little noise, and without giving any of the statutory and customary signals, by sounding its whistle or ringing its bell. But neither the evidence, nor the specific findings of the court, sustain the more general finding, to the effect that plaintiff's wife, in approaching the track of defendant at the place where she was killed, used ordinary care, and did that which an ordinary prudent person would have done under the circumstances, and did not by her own carelessness or negligence in any wise contribute to said accident or injury. The deceased was a woman of mature age, in good health, and in full possession of all her faculties. She approached the track of defendant on foot and by daylight, at a point from which it was plainly visible to a distance of 800 feet to the eastward, beyond which it made a curve to the north. When 30 feet distant from the track she was seen to look towards the east, and then immediately advance along a path which crossed the track at an angle of 30 degrees. As the track extended nearly east and west, and her course was from southeast to northwest, this caused her face to be turned partly away from the train, which was approaching from the east. It is to be inferred that, when she looked towards the east from the point 30 feet distant from the track, the train had not rounded the curve and was out of view, for she advanced slowly along the path, without again looking up, and when in the act of stepping on the track was struck by the locomotive and killed. Under these circumstances it is clear, in view of numerous decisions of this court, and of the great weight of authority elsewhere, that she cannot be acquitted of culpable negligence directly contributing to the fatal result. While it is true that negligence is ordinarily a question of fact, it is in some cases a conclusion of law. In the case of *Herbert v. Southern Pacific Co.*, 121 Cal. 230 [53 Pac. 651], Justice Temple, delivering the opinion of the court, after laying down the general rule, stated the exception as follows:

“ ‘But cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and, if any element is wanting, the courts will hold, as a matter of law, that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care, as well as the nature of it, has been settled.’ To illustrate this view, he proceeds as follows: ‘The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and

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listen for approaching trains. What he must do in such a case must depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precaution.'

"The language here quoted, from one of our own decisions, is strictly applicable to the present case. If plaintiff's wife had taken the precaution to look, and had availed herself of every opportunity she had to look for the approaching train, she need not have been injured, and we are not obliged to resort to any presumption to establish her failure to take the required precaution, for the evidence and the findings show that, after looking along the track toward the east once, when she was thirty feet distant therefrom, she did not look again, but, turning her face in an opposite direction, walked so slowly that the train, coming from a point beyond her view at the time she looked, could travel over eight hundred feet while she was covering the thirty feet between her point of observation and the nearest rail of the track. The only answer of the respondent to the claim that this was negligence per se is that the precaution she took would have been entirely sufficient if the train had not been running at a reckless rate of speed, and that she had a right to assume that it would only move at a lawful and proper rate. But this argument also is answered by the Herbert Case, where Judge Temple, commenting on a similar contention, says: 'The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by plaintiff, if he were not also in default.' There is, in other words, no occasion for the application of the rule as to contributory negligence, except in cases where it is shown or assumed that the defendant has been guilty of actionable negligence. When such negligence is not shown, he is for that reason alone free from any liability, and only when it is shown has he any occasion to exonerate himself by proof of contributory negligence on the part of the plaintiff. It is no excuse, therefore, for plaintiff's wife that the train was running faster than was proper at that point. There was no law or ordinance restricting its speed to any particular rate, and if, as the trial judge concluded, the speed was, under the circumstances, excessive, a reasonably careful person would have guarded himself from the consequences of such negligence by the easy and simple precaution of looking when about to pass from a position of safety to a position of danger. A person on foot, in possession of all his faculties, and in complete control of his own movements, stepping on a railroad track immediately in front of a train which has been moving eight hundred feet at a speed of less than thirty miles an hour, in full view, is clearly guilty of negligence. Upon this point the case of *Holmes v. S. P. Co.*, 97 Cal. 167 [31 Pac. 835], is conclusive authority. There it was said: 'A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of

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discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation, is negligence per se.' This statement of the doctrine of negligence per se, made ten years ago, was based upon several decisions of this and other courts, cited in the opinion of Justice De Haven, and the rule has been applied in a number of more recent cases decided here. See *Herbert v. So. Pac. Co.*, 121 Cal. 227 [53 Pac. 651]; *Bailey v. Market St. C. Ry. Co.*, 110 Cal. 329 [42 Pac. 914]; *Lee v. Market St. C. Ry. Co.*, 135 Cal. 295 [67 Pac. 765]; *Green v. So. Cal. Ry. Co.* [Cal.] 70 Pac. 926; *Warren v. So. Cal. Ry. Co.*, Id., and cases cited.

"In other jurisdictions the same doctrine has been frequently applied in cases closely resembling the present. These decisions have been cited in the briefs of counsel, and it is unnecessary to repeat the citations here, but we will quote the language used by the judges in one or two instances in discussing a state of facts substantially the same as those which we have before us.

"Commenting upon a case in which the injured party had looked for an approaching train when some distance from the track and had then driven on without again looking, the Supreme Court of New Jersey says: 'If risk is inherent in a continuing state of things, the duty to exercise reasonable care is a continuing obligation. This at least must be true: That a man is negligent who attempts to drive across a railroad line after listening and looking only once toward a quarter from which a train may approach, if these acts of attention and observation are performed when the observer is so far from the crossing that before he will reach it a train coming from that quarter, and open to his further attention and observation, has time to advance so as to endanger him.' After citing several decisions to the same effect, the court proceeds: 'These opinions show that persons who cross railroad tracks, either on foot or in vehicles, are strictly held to the duty of careful observation and attention. In each of these cases the plaintiff was injured notwithstanding some care on his part. In each case a judgment of nonsuit was sustained. In each case the defect in plaintiff's cause of action was the same. The defect was that, though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety.' *Winter v. New York R. R. Co.*, 66 N. J. 677, 50 Atl. 339. In *Georgia Ry. Co. v. Forshee*, 27 South. 1010, the Supreme Court of Alabama says: 'It is equally clear, on principle and authority, that this duty must be performed at such time and place, with reference to the particular situation in each case, as will enable the traveler to accomplish the purpose the law has in view in its imposition

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upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the track. If he stops so far from the railway as that a train, which could not be seen from that point, could and does reach the crossing by the time he has traversed the intervening distance and gotten on the track, he negligently contributes to the resulting collision and injury, and the same is true if, though he stop at the track, he lingers there after looking and listening, and delays crossing until a train not in sight or hearing when he stopped, looked, and listened has come meantime upon the scene, and collides with him when he does attempt to cross.' The Court of Appeals of New York, speaking of the duty of a person about to cross a railroad track, says: 'To be sure, the statute requires a railroad company to give specified warnings, but it neither takes away a man's senses, nor excuses him from using them. The danger may be there. The precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in the very road of casualty.' *Wilds v. Ry. Co.*, 24 N. Y. 430. The Supreme Court of Minnesota says: 'We are unable to find in the record any excuse for the intestate's disregard of his obvious duty to himself to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track. Until then he had full control of his movements. He could, by the slightest move of his head towards the east, have discovered his hazard, and by the slightest check of his movements have avoided the same.' *Olson v. Northern Pac. R. R. Co.*, 84 Minn. 258, 87 N. W. 843. In all of the cases from which the foregoing quotations have been made, and in many others cited in the briefs, the negligence charged against the defendant, and proved or assumed for the purpose of the decision, was excessive speed in the movement of trains, or omission of customary signals by sounding the whistle or ringing the bell—the same character of negligence, that is to say, which plaintiff contends excused his wife from looking a second time for the approach of the train. They therefore sustain both propositions laid down by Justice Temple in the Herbert Case, as stated above, and, in the absence of more direct authority to be found in our own decisions, would warrant us in holding, if the question were a new one, that a person who, with his eyes open, steps upon a railroad track immediately in front of a moving train, visible from a point eight hundred feet distant from the point of collision, is necessarily, and as matter of law, guilty of contributory negligence."

The foregoing from the former opinion, in our judgment, contains an accurate statement of the evidence, a clear consideration and discussion of the findings, and correctly announces and applies the doctrine of contributory negligence to the case at bar,

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from all of which it appears that, while the defendant was guilty of negligence, plaintiff's intestate was likewise guilty of such contributory negligence as precluded a recovery by plaintiff. Under such circumstances, the judgment and order must be reversed, unless there is some other feature of the case presented by the findings upon which they can be sustained. It is contended by respondent that such a feature exists, and that it arises from a special finding of the court—No. 7—which is as follows: "As said train rounded said curve and came upon said Humboldt street, going at a high and dangerous rate of speed downhill, no bell on the engine thereof being rung, or other warning of its approach being given, the engineer in charge of the engine on said train saw said Bessie Green, and knew that she was walking on said path, and crossing said Humboldt street, ahead of said train, and that she gave no evidence of knowledge of the approach of the train; that, notwithstanding such facts, said engineer did not slacken or lessen the speed of said train, or attempt to give said Bessie Green warning of its approach; that as and just after said train crossed said Avenue 23, going toward said Bessie Green, and at such high rate of speed, said engineer still saw said Bessie Green, and still saw and knew she was advancing upon said track, and that she still gave no evidence of knowledge of the approach of said train, but said engineer still did not lessen the speed of said train, or blow a whistle or ring a bell, or give other warning of the approach of said train, nor was any given until the train was within 10 or 15 feet of the point of the accident; that said engineer could have stopped said train at any time within 200 feet after starting to do so; that, when within ten or fifteen feet from the place of such accident, the engineer blew the whistle, applied the air brakes, and reversed the engine, and did all in his power, with the appliances he had, to stop the train, and the fireman rang the bell."

Respondent's contention is that, while the general rule may be that one cannot recover where his neglect contributed proximately and directly to the accident, yet this rule is subject to the exception that, where a defendant, discovering that a party has placed himself in a place of danger or peril, refuses or fails to do some act within his power which would have prevented or avoided the accident, then the defendant will be liable, notwithstanding the neglect of the plaintiff may have contributed to the injury, and contends that this finding presents such a condition as calls for the application of the exception to the general rule in the case at bar. There is no question but that this exception to the general rule exists, and is usually extended to that limited class of cases where the failure to avoid the injury after discovery of the danger to plaintiff amounts to gross neglect and approaches actual wantonness on the part of the defendant. The rule on this subject is tersely and clearly stated in *Shearman & Redfield on Neglect* (section 99) as follows: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by defendant's neglect, notwithstanding the

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plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him." It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it. This whole subject is fully discussed in *Holmes v. So. Pac. Co.*, 97 Cal. 169, 31 Pac. 834, where the plaintiff, walking up and down the defendant's track at a station while waiting for an approaching train, negligently remained on the track and was struck by the locomotive. In that case, discussing the liability of the defendant, notwithstanding the plaintiff's contributory negligence, this court quotes approvingly the language of the Supreme Court of Maine in *O'Brien v. McGlinchy*, 68 Me. 552, as follows: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. * * * But this principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." And after quoting thus far from that decision, our court then proceeds: "This, we think, may be regarded as a correct statement of the law upon this point, and as furnishing a clear and definite rule by which to determine in any case whether or not the negligence of the person injured may be said, in a legal sense, to have contributed to such injury; and, when we apply this rule to the case here, it is at once seen that, even if it should be conceded that there was negligence upon the part of the defendant in its management of the train at the time of and just preceding the accident, still the plaintiff would not be entitled to recover, as such accident could not have occurred without the concurrent and active negligence of the deceased at the time. The defendant was not the only one who could have prevented the accident, but, on the contrary, if the deceased had himself used ordinary care at the time, he could not possibly have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the very moment that he was struck by the engine, it was within his power to escape the injury which he received by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his

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part but for his own negligence at the time in not looking or listening for the approach of the train." The general rule and the exception are further fully discussed by Justice Angellotti in the recent case of *Harrington v. Los Angeles Railway Co.*, 140 Cal. 514, 74 Pac. 15.

In the case at bar, however, giving the respondent the full benefit of any favorable deduction which can be made from the quoted finding, still it does not present any condition to which the exception to the general rule can apply. All that this finding in effect declares is that the defendant was guilty of negligence in failing to give the usual warnings, and running its train at an excessive rate of speed; that the engineer saw Bessie Green approaching the track along a path which crossed it; that she gave no evidence of knowledge of the approach of the train, and that, notwithstanding such fact, the engineer did not slacken or lessen the speed of the train, or attempt to give said Bessie Green warning of his approach. But during all this time, it will be observed, Bessie Green was in a position of absolute safety. She was not upon the defendant's track, but walking upon the pathway approaching it. There was nothing to indicate to the engineer that she would leave that place of safety and put herself in one of danger. The mere fact that she gave no evidence of a knowledge of the approach of the train while walking along the pathway towards the track did not indicate to the engineer that she was about to place herself in a position of peril. It is a matter of common observation that thousands of people daily cross in front of trains, and approach crossings for that purpose, without giving any indication that they are aware of the coming of the train. They proceed, determining for themselves whether they have sufficient time to make the crossing safely or not—solicitous only for their personal safety, and giving no indication to the engineer whether they will hazard the risk of crossing, or pause until the train passes by, or in any manner indicating that they are aware of the approach of the train, or are concerned about it. And as to this quoted finding, there is nothing in it to indicate that, as far as the engineer knew or could have known, Bessie Green might not have been perfectly well aware of the approach of the train, and still have given no indication or manifestation of that knowledge. The law cast upon her the duty of looking to see, when approaching the point of danger, whether there was a train in sight which might prevent her crossing the track in safety; and the engineer had a right to assume that she had taken the precaution which the law required to insure her own safety, was aware of the situation, and, being in a place of safety, would remain there, and not pass to a point of danger. And unless it can be said, as a matter of law, that it is the duty of an engineer to check his train when he sees one approaching a track, and giving no indication of knowledge of the coming train, then this finding amounts simply to a finding that the engineer was negligent, which, of course, is conceded in the case. This is not, however, the negligence which we are now

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discussing, and for which the defendant is claimed to be liable. Its liability is for negligence after the engineer had discovered that Bessie Green had placed herself in a position of actual danger. During all the time that she was approaching along the pathway to the crossing, she was in a position of absolute safety, and there is no rule of law which charged the engineer with knowledge that she was about to change her position of safety for one of peril. On the contrary, the engineer had a right to assume that she was in possession of her faculties, and would retain her place of safety, and not recklessly expose herself to danger. To hold that the engineer, because she gave no indication of knowledge of the approach of the train, was bound to assume that she would heedlessly leave a place of safety, put herself upon the track, and endanger her life, would be to revise the rule which, as far as we are advised, is universal in all jurisdictions, and certainly is the rule in this state, that, where an engineer sees a person approaching a track, he has the right to presume that the person is in possession of his ordinary faculties, alert to the danger which may ensue from passing trains, and that he will not attempt to cross in view of the train, and is therefore not required to check the speed of the train to enable him to cross in front of it, or to ascertain whether he is about to do so.

In *Green v. Southern Pac. Co.*, 122 Cal. 565, 55 Pac. 579—an action brought to recover damages for the death of the husband, killed at a crossing—this court says: “Unless the defendant knew or had reason to believe that the deceased was, from some cause, not possessed of the ordinary ability to care for himself, it had the right to presume that he possessed such ability, and would take the ordinary precautions to protect himself from injury.” See, also, *Holmes v. S. P. C. Ry.*, 97 Cal. 161, 31 Pac. 834.

And the general rule upon this subject is clearly expressed in *Olson v. Northern Pacific R. R.*, 84 Minn. 258, 87 N. W. 843, heretofore referred to. That was a case where the deceased was killed in attempting to cross a railroad track, and the court, in its decision, comments on the facts, and declares the rule of law applicable to them. It says: “We are unable to find in the record any excuse for intestate’s disregard of his obvious duty to himself to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track. Until then he had full control of his movements. He could, by the slightest movement of his head towards the east, have discovered his hazard, and by the slightest check of his movements have avoided the same. Under such circumstances, his obvious want of care must preclude a recovery in this case. * * * Plaintiff strenuously urges that, notwithstanding plaintiff’s intestate may have been negligent, yet the servants in control of the engine of the freight train could, with ordinary care, have discovered his danger, and their failure to ring the bell, or make some effort to avoid the

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accident, after they could have seen intestate, authorizes the submission of the case, notwithstanding such contributory negligence. We are unable to adopt this view. The reasonable presumption that due care will be exercised by all persons in mutual relation, when care is required, is not a partial or one-sided doctrine, but applies to each alike. It seems clear to us that while the intestate might have the right to say that all signals should be observed by the defendant's servants, in the exercise of ordinary care by such, the latter would also have the right to indulge in the same presumption with reference to the conduct of the unfortunate man who was deprived of his life by his own negligence, and presume that he would do his duty, likewise. The engineer could not be held to suppose absolutely, as a matter of law, that a young man of good intelligence, with average faculties, before going on a railway crossing, would keep his head turned away from the direction in which a train might be approaching, when the slightest glance of the eye, even at the last moment, would apprise him of the danger, or the checking of his movements, upon the plainest dictates of common prudence, would have protected him from injury." In the case of *Gahagan v. Boston & M. R. R.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426, which was likewise an action for injuries received at a crossing, the court, discussing the reciprocal duties of pedestrians and railroad trains, uses the following language: "In the present case there is evidence that, when the plaintiff was first seen by the engineer, the collision could have been prevented. If the engineer knew or ought to have known then that the plaintiff would be upon the crossing when the train reached it, and could have avoided the collision, his failure to do so is the proximate cause of the injury. As there was evidence that the collision might have been prevented by him, the sole remaining question is whether, upon the evidence, reasonable men might find the engineer ought then to have foreseen the plaintiff's negligence. The bare fact that the plaintiff was seen approaching the track is not sufficient to authorize such a finding. If it were, the rule heretofore laid down, and found to be approved by the authorities and the reason of the case, that it is the duty of the highway traveler to stop and allow the train to pass, would be reversed. It would then become the duty of the train to stop and wait for the person on foot to go by. This would be unreasonable, unpracticable, and put an end to the modern system of rapid transportation demanded by the public, and to effectuate which railroads are authorized by the state. The company's servant may ordinarily presume that a person apparently of full age and capacity, who is walking upon the track at some distance before the engine, will leave it in time to save himself from harm, or, if approaching the track, that he will stop, if it becomes dangerous for him to cross it." To the like effect, we assign a few other authorities: *Beach on Contributory Negligence*, § 394; *Cleveland, etc., R. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Guyer v. Mo. Pac. Railway Co.*, 174 Mo. 344, 73 S. W.

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584; *Kirtley v. Chicago, etc., Railway Co.* (C. C.) 65 Fed. 386; *Boyd v. Wabash Western Railway Co.*, 105 Mo. 371, 16 S. W. 909; *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287; *McNab v. United Railway, etc., Co.*, 94 Md. 719, 51 Atl. 421; *Rider v. Syracuse Rap. T. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Jackson v. Kansas City, etc., R. Co.* (Mo.) 58 S. W. 32.

As the authorities thus declare that the engineer had a right to assume, as the court in this case found the fact to be, that Bessie Green was in the full possession of her natural faculties, and to further assume that, as she was in a place of safety on the path, she would not expose herself to the danger of attempting to cross the track, the question arises, when did Bessie Green place herself in a position of danger, and, when she so placed herself, did the plaintiff's employees exercise every effort to prevent injury to her? This question is answered both by the evidence and the findings. In the case at bar, as in the Minnesota case above quoted, it is apparent that Bessie Green was guilty of no contributory negligence up to the moment when she stepped upon the defendant's track in practically the actual presence of the approaching train. Until then she was in perfect safety, and, as said in the Minnesota case, "until then [which was to the very moment he stepped upon the main track] he had full control of his movements. He could, by the slightest movement of his head towards the east, have discovered his hazard, and, by the slightest check of his movements, have avoided the same." Having, then, placed herself in a position of peril only from the moment she stepped from the pathway to the track, did the defendant's engineer, when her peril thus arose, have a clear opportunity of avoiding injuring her, and did he fail to do so? We are satisfied that this inquiry must be answered in the negative, and that this conclusion is irresistible when we consider the finding above quoted—special finding No. 7—in connection with another special finding—No. 6. This last finding is "that just as Bessie Green stepped upon defendant's track to cross the same, going as above described, she was struck by the engine of defendant's train, running down and along said track." It is apparent from the quoted finding, No. 7, that from the moment the engineer discovered that Bessie Green was about to pass from the footway onto the track—from her place of safety to one of peril—he did all in his power to avert the accident, because it is expressly found "that, when within ten or fifteen feet from the place of such accident, the engineer blew the whistle, applied the air brakes, and reversed the engine, and did all in his power, with the appliances he had, to stop the train, and the fireman rang the bell." Now, taking these findings together, it is quite clear that Bessie Green was guilty of contributory negligence in stepping from a point of safety to one of danger in the presence of the train, and without taking any of the ordinary precautions which the law cast upon her in her situation; that she was only placed in such peril at the moment when she stepped from her

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point of safety upon the pathway to the track; and that, from the instant when she placed herself in that situation of peril, the defendant's employees did all in their power to avert the accident, but without avail. This was all the law required of them.

As, then, the special finding relied on by respondent is unavailing, considered in connection with the other findings, to take the case from the operation of the general rule that contributory negligence will defeat a right of recovery, and as it appears that the proximate cause of the death of Bessie Green was her own contributory negligence, the judgment in favor of the plaintiff cannot be sustained, and it, together with the order denying defendant's motion for a new trial, are reversed, and the cause remanded.

We concur: MCFARLAND, J.; HENSHAW, J.

WOLF v. CITY & SUBURBAN RY. CO.

(Supreme Court of Oregon, Nov. 28, 1904.)

[78 Pac. Rep. 668.]

Street Railways—Crossing Accident—Contributory Negligence—Question for Court.*—One who in broad daylight stops beside a street car track till the car approaching at an unlawful speed is within 10 feet of him, when he attempts to cross in front of it, is guilty of contributory negligence, as matter of law, barring recovery for his injury.

*See foot-note appended to Roenfeldt v. St. Louis & S. Ry. Co. (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470.

On rehearing. Denied.

For former report, see 72 Pac. 329.

MOORE, C. J. A petition for a rehearing having been filed, it is contended therein that an error was committed in concluding that the lower court improperly denied defendant's request to direct a verdict in its favor. It is argued that in reversing the judgment, which is based on a verdict, this court reviewed conflicting testimony, and deduced a conclusion from what it considered to be a preponderance, thereby invading the province of the jury. The testimony of plaintiff's witnesses tends to show that the day on which the accident occurred was clear and dry; that the rate of speed prescribed by ordinance for the operation of street cars in the city of Portland was eight miles an hour; that the car causing the injury was heavily loaded with passengers, and running down a steep grade faster than the regulations permitted; that the gong on the car was not struck, nor the speed slackened, until after the injury was inflicted; and that Mr. Wolf, though possessed of good eyesight and hearing, did not halt in crossing the street in front of the approaching car. None of plaintiff's witnesses, except possibly Mrs. Alter, seems to have

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observed Wolf as he crossed the street until he reached either the west line of rails—the car being on the east track—or until the car had nearly reached the crossing, so that the testimony of defendant's witnesses that he halted in the western double track until the car was nearly opposite him before proceeding on his journey is not contradicted. Joseph Friedman, plaintiff's witness, who beheld the accident, testified that he did not see Mr. Wolf until one more step would have taken him out of harm's way. Mrs. Alice Walker, a witness for the prosecution, says she first saw Wolf on the west side of First street, as he was crossing it, but on redirect examination she qualifies this declaration by stating: "I never noticed him until the car hit him there." Mrs. Motts, another witness for the same party, who was standing with Mrs. Walker at the northeast corner of First and Mill streets, waiting for the car, at the time of the accident, in answer to the question, "On what part of the crossing was he [Wolf] when you first saw him?" replied, "I was on the corner, and he came right between the car and me." On cross-examination she stated that when she first saw Wolf he had reached the west track. "Q. And you had not seen him before that? A. No, sir."

Mrs. Eva Alter, who testified by an interpreter, said she was standing south of the southeast corner of Mill and First streets at the time of the accident; that she first saw Wolf as he started to cross the latter street; that he walked without stopping; and that she watched the car and Wolf from the time she saw them until the accident happened. The writer hereof entertained the opinion that the testimony of this witness respecting Wolf's actions immediately preceding the accident was sufficient to dispute the testimony given by defendant's witnesses, and that based thereon the cause was properly submitted to the jury; but the opinion heretofore rendered states that the position occupied by Mrs. Alter was such as to render it physically impossible for her to have seen Wolf all the time he was crossing the street, because the car, after passing her, obstructed her view of him, and the petition for a rehearing, referring to this declaration, admits, "This is undoubtedly true." Accepting such concession as a correct statement of the fact, a review of the testimony given by defendant's witnesses becomes necessary:

G. Grohs, who was standing on the front platform of the car, at the right of the motorman, says that he first saw Mr. Wolf crossing the street, whereupon the gong was struck and the brake applied, causing the speed of the car to slacken; that Wolf stopped in the west track, whereupon the brake was released, and, the car going forward, he jumped in front of it when it was about seven or eight feet from him. On cross-examination, in referring to plaintiff's husband, the witness was asked, "When he stopped, how far was the car from him at that time?" and answered: "I guess about 50 feet. Q. What was Mr. Wolf doing during the time the car was running that 40 feet? A. He just made a stop there." The testimony of this witness is corroborated

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by that of C. F. Lawson, the motorman in charge of the car, and also by that of J. R. Carswell, a passenger thereon at the time of the accident. Joseph S. Bier, another passenger, in speaking of Wolf as he halted in the west track, testified as follows: "He looked right at the car." Lawson, in referring to Wolf at the time the brake was applied, says: "When I stopped he looked up towards the car." This witness, in answer to the question, "Was there anything between the car and him to obstruct his vision?" replied, "There was nothing to obstruct his view at all." Carswell, who saw plaintiff's husband on the track, was asked, "Was there anything to obstruct your view of Wolf?" and answered, "Nothing." A fair analysis of the testimony shows that there is no controversy or dispute in relation to Wolf's having stopped on the west line of rails, and remained in that position until the car had reached a line about 10 feet south of him, when, suddenly trying to cross in front of it, he sustained an injury which caused his death. Though the witnesses for the respective parties disagree in their testimony in several material matters, the plaintiff's right of action depends on the consideration of a single question—whether or not her husband's proximity to the car when he attempted to cross in front of it affords such evidence of contributory negligence that the trial court could say, as a matter of law, that it precluded a recovery of the damages sustained in consequence of the injury inflicted. In discussing this subject it will be assumed that the testimony given by plaintiff's witnesses and the inferences deducible therefrom are true, and tend to show that at the time of the accident the car was running at a prohibited rate of speed, and that the gong was not sounded. Wolf was attempting to cross a public street on a walk provided for that purpose, and had a right to pursue his journey on the line selected. If a pedestrian could not legally cross a line of rails in a populous city in front of a street car, his travel on the public thoroughfares occupied by street railways would necessarily be limited to a few hours at night, when cars cease running, for in the daytime they constantly follow each other in rapid succession, and any crossing of the street would necessarily be in front of a car. So, too, a street car company, having secured a franchise, has a lawful right to propel cars along its tracks, and is not compelled to desist therefrom because some public crossing on its lines may be occupied by pedestrians, for, if the converse were true, no street car could be operated except when inclemency of weather or darkness suspended such travel, thereby rendering the operation of street cars unprofitable and of no use to the public. Travelers on foot and in carriages, as well as street car companies, have equal and reciprocal rights in and to the use of public streets, and neither can deprive the other of the enjoyment thereof. Because a person is authorized to cross a street car track, the exercise of such right will not justify his attempt to do so in front of an approaching car, when danger therefrom may reasonably be apprehended. The rights of travelers and street cars to use public streets being commen-

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surate, and the degree of responsibility of each measured by the facility with which their respective movements may be controlled, the crossing of a line of rails by a person sui juris will not constitute contributory negligence unless the proximity of an approaching car would have warned an ordinarily prudent mind of the impending danger. *Campbell v. Traction Co.*, 137 Cal. 565, 70 Pac. 624. In that case Mr. Justice McFarland, in speaking of the duty of a person attempting to cross the track of a street railway in front of a car, says: "Of course, in a case like this there may be undisputed facts from which the legal conclusion of contributory negligence necessarily follows, and this may be so when the collision happens on a street railroad. But as has been frequently held by this court, the same character of care is not demanded of one crossing a street railroad where cars are frequently passing at a slow rate of speed and can be easily controlled as is demanded of one crossing an ordinary steam railroad running through the country, on which heavy trains, difficult to control, go at stated times with great speed. With respect to a street railroad, the mere fact that a person attempts to cross it when a car is seen to be approaching does not of itself constitute contributory negligence. Of course, one in close proximity to an approaching street car might walk or drive in front of it so suddenly as to clearly be guilty of contributory negligence; but ordinarily, whether or not he was negligent in attempting to cross, under the circumstances of the case, is a question for the jury."

In the case at bar we think the undisputed testimony shows that, though it be admitted that the car was running at a prohibited rate of speed, and that no bell was rung as the crossing was approached, the deceased, having seen the car, attempted to cross in front of it, and in such proximity thereto that his act conclusively shows such contributory negligence that the trial court should, as a matter of law, have told the jury that plaintiff could not recover for the injury sustained, and hence we are compelled to adhere to the former opinion. It is possible, however, that plaintiff may hereafter be able to prove that when her husband attempted to cross the track the car was further away than is indicated by the testimony of defendant's witnesses, and what has been here said is not intended to preclude another trial.

The petition for a rehearing must be denied, and it is so ordered.

CHICAGO & E. I. R. Co. *et al.* v. SCHMITZ.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 1050.]

Appeal—Review.—In a personal injury action it is not the province of the Supreme Court to pass on the weight of the evidence.

Accident at Crossing—Open Gates.*—The opening of railroad gates at a street crossing after a train has passed is an invitation to a pedestrian to proceed across the tracks, and whether he is justified in so doing without looking and listening for approaching trains is for the jury.

Same—Negligence—Question for Jury.—In an action against a railroad company for damages to a pedestrian in a collision with a train at a street crossing, evidence examined, and held to require the submission to the jury of the question of the company's negligence in operating the train.

Appeal—Review.—When a judgment of the trial court is in favor of plaintiff, and the Appellate Court affirms that judgment, all questions of fact are settled, so far as the Supreme Court is concerned.

Same—Same.—In the absence of an exception to the action of the trial court overruling a motion for a new trial the Supreme Court cannot pass on the weight of the evidence, even if justified in so doing because the judgment was affirmed by the Appellate Court on the two judges qualified to sit disagreeing.

Medical Testimony—Cross-Examination.—In an action for personal injuries, a physician testifying for plaintiff in regard to the injuries sustained cannot be cross-examined with reference to his professional opinions in other personal injury suits.

Same—Impeachment.—Where, in a personal injury action, a physician testified for plaintiff as to the extent of the injuries sustained, defendant could not show by direct examination of a witness that the physician was interested as a medical man in personal injury suits against corporations.

Appeal—Review.—Where appellant took no exception to the ruling of the court in overruling its motion for a new trial, errors of the trial court in rulings as to the admissibility and exclusion of evidence are not reviewable.

Liability for Negligence of Another Company in Using Track.†—When an injury results from the negligent operation of a railroad, whether by the corporation owning it or by another corporation authorized to use its tracks, the company owning the road is liable.

Pleading—Admissions.—Where, in an action against a railway company for personal injuries, the declaration alleged that defendant company was in possession of the road and operating it, and the plea of not guilty was filed, it was impliedly conceded by the pleadings, that the defendant company was a corporation, and was operating the road mentioned in the declaration, and that those in charge of trains thereon were its servants.

Ownership of Railroad—Sufficiency of Evidence.—In an action against a railway company for personal injuries the declaration

*As to whether an invitation to cross railroad tracks is implied from the fact that crossing gates are open, see foot-note appended to *Baltimore & O. R. Co. v. Stumpf* (Md.), 9 R. R. R. 203, 32 Am. & Eng. R. Cas., N. S., 203, where all the preceding authorities in this series are collected; *Chicago & A. R. Co. v. Wise* (Ill.), 10 R. R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8.

†See foot-note appended to *Lewis v. Maysville & B. S. R. Co.* (Ky.), 11 R. R. R. 780, 34 Am. & Eng. R. Cas., N. S., 780.

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averred that defendant company "owned, controlled, and operated a certain right of way." This allegation was mere inducement of the general charge of negligence. The witnesses for plaintiff spoke of the track as the track of the defendant company. Held, that the proof of ownership was sufficient to support the declaration.

Same—Same—Accident at Crossing.—One suing a railroad company for personal injuries sustained by being struck by a train at a street crossing is not required to make formal proof of ownership of the railroad, but evidence of common reputation is sufficient.

Appeal from Appellate Court, First District.

Action by Appollonia Schmitz against the Chicago & Eastern Illinois Railroad Company and others. A judgment was rendered in favor of two of defendants, and from a judgment of the Appellate Court affirming a judgment in favor of plaintiff against defendants Chicago & Eastern Illinois Railway Company and another they appeal. Affirmed.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county against appellants. The action, which was in case to recover damages for personal injuries sustained by appellee on September 26, 1900, was originally brought against the two appellant companies, the Chicago & Eastern Illinois Railroad Company and the Chicago & Western Indiana Railroad Company, and also the Chicago & Grand Trunk Railway Company and the Wabash Railroad Company. At the close of the plaintiff's case peremptory instructions were given to find the Grand Trunk and the Wabash Companies not guilty, and a verdict and judgment were entered accordingly. The case then proceeded to verdict and judgment for appellee against the two appellant companies. There was no decision by the Appellate Court, as one of the justices had presided at the trial below and took no part in the proceedings, and the two remaining justices were unable to agree upon the case as presented for review, so that judgment was affirmed by operation of law.

The accident which caused the injuries happened in Chicago at a point where Twenty-Fourth Place, running east and west between Twenty-Fourth and Twenty-Fifth streets, crosses eight railroad tracks running north and south. The easterly four of these tracks are the Pennsylvania or Ft. Wayne tracks. The westerly four are the Chicago & Western Indiana Railroad Company's tracks. The two sets of tracks are separated by a space 12 or 15 feet wide, and in this space was the tower house occupied by the operator of the crossing gates. On the night of the accident plaintiff left her house, which was about $2\frac{1}{2}$ blocks from the tracks, a little before 8 o'clock, and was proceeding along the south sidewalk of Twenty-Fourth Place going west. She passed over four tracks of the Pennsylvania System, and approached near to the east track of the four tracks, controlled by the Western Indiana Railroad Company. She says that when she came to the tracks she looked north and saw nothing. She stopped and stood under the tower house while a freight train on the fourth

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or westerly track of the Western Indiana tracks passed to the south. She says that she heard the rattling of the engine of the freight train. According to her statement, when the last car of the freight train cleared the sidewalk, she saw the gate west and in front of her go up, and she moved forward; but as she stepped upon the Western Indiana tracks, looking south, she saw the light of an engine, and was struck, according to her statement, on the first track—that is, the easternmost track of the four Wabash Railroad tracks—by a locomotive going north. The testimony of appellants tended to show that the locomotive which struck the appellee, or plaintiff below, was a locomotive of the appellant the Chicago & Eastern Illinois Railroad Company. After being struck, appellee was assisted by two men from the place of the accident to a church, to which she was on her way when she was struck, and after staying there a few minutes until she recovered from a fainting spell was assisted to her home by some women. She was confined to her bed about four months, and to her home about nine months. She was injured in her side, hip, and shoulder, and has since been troubled with dizziness and vomiting spells, and has been lame and obliged to use a crutch. She was at the time of the accident 52 years old, and weighed about 135 pounds, and at the time of the trial weighed 121 pounds.

The declaration consisted of one original and two additional counts. The original count charges that the Western Indiana Company was owning and controlling a certain right of way with a certain railway and certain tracks and gates and other appurtenances thereon across a certain public highway, to wit, Twenty-Fourth Place, and that the Chicago & Eastern Illinois Railroad Company, Wabash Railroad Company, and Grand Trunk Railroad Company, by agreement with the Chicago & Western Indiana Railroad Company, were using said right of way, etc., and said defendants so carelessly, negligently, and wrongfully operated and managed said railway and the gates and other appurtenances thereon that by and through the carelessness, negligence, and wrongful conduct of the defendants plaintiff was injured. The first additional count charges that the Western Indiana Railroad Company “owned, controlled, and operated a certain right of way,” etc., with tracks and gates, and the defendants “used said right of way, tracks, etc., in pursuance of their business for the running of trains, etc., and that the defendants so carelessly, negligently, improperly, and wrongfully ran, drove, operated, managed, and controlled their said locomotives, engines, etc., that the plaintiff was injured.”

The second additional count charges that the defendants controlled and operated a certain other right of way and certain tracks and gates and appurtenances thereon, with a certain railway, and that said defendants “used said right of way, railway tracks, and other appurtenances in the pursuance of their business of running trains, engines, etc., that they so negligently, carelessly,

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etc., operated, managed, and controlled their engines that the plaintiff was injured."

The plea was the general issue to the entire declaration. At the close of the plaintiff's case, and again at the close of all the evidence, each of the appellants requested the court to give a peremptory instruction to the jury to find a verdict of not guilty. Such instructions were refused as to the present appellants, and exceptions were preserved. A special interrogatory, at the request of the appellants, was submitted to the jury, which was: "Could the plaintiff, by the exercise of ordinary care, have discovered the approach of the engine or train in time to have avoided the accident by the exercise of ordinary care on her part?" To this special interrogatory the jury answered "No."

Calhoun, Lyford & Sheean, for appellants.

Richolson & Levy (*C. Stuart Beattie*, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). 1. Appellants contend that the peremptory instructions to find them not guilty should have been given upon the alleged ground that the only conclusion to be drawn from the evidence is that appellee was guilty of contributory negligence. It will be noted that the contention of the appellants is, not that the evidence tends to show that appellee was guilty of contributory negligence, but that, as matter of fact, the appellee was guilty of contributory negligence. The objection so made by counsel seems to impose upon this court the task of passing upon the weight of the evidence. Such is not the province of this court in a case of this kind. It cannot be denied, under the facts of this case, that there was evidence tending to show that appellee was in the exercise of due care for her own safety when she was injured, and that appellants were guilty of such negligence as caused the injury. Appellee says that when advancing west on Twenty-Fourth Place towards the four easterly tracks of the Pennsylvania Company the gate on Twenty-Fourth Place on the east side of those tracks was open, and, as it was open, she advanced through the gate across the four tracks of the Pennsylvania Company to the space between them and the Western Indiana tracks, where she took her stand under the tower house. The tracks in question ran north and south on Stewart avenue across a public highway, to wit, Twenty-Fourth Place, and therefore, if the eastern gate was up or raised, she was justified in advancing west upon the south sidewalk of Twenty-Fourth Place across the Pennsylvania tracks. The testimony of the appellants tends to show that the eastern gate was down, or closed, and that the appellee passed through the space between the end of the gate and the fence. Appellee is sustained in her statement that the gates were up by the testimony of another witness. But it was for the jury to say whether or not the eastern gate was raised or whether it was closed.

While standing under the tower house in the space 12 feet wide between the Pennsylvania tracks on the east and the four

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Western Indiana tracks on the west, appellee saw a freight train pass south on the fourth or westernmost track of the Western Indiana Railroad Company's tracks. The bell of the freight train was ringing, and she heard it. As soon as this freight train passed across Twenty-Fourth Place to the south, she says that the western gate on the west side of the Western Indiana tracks was raised, and that, seeing the gate open, she started upon Twenty-Fourth Place to the west. As we understand the evidence, there is nothing to contradict her statement that the gate on Twenty-Fourth Place west of the Indiana tracks was thus raised or open when the freight train had passed. She says that before she started west across the first or easternmost track of the Western Indiana tracks she looked north, and saw nothing, and that she was unable to see towards the south on account of a post which stood there, but that, as soon as she started across the first track an engine coming from the south towards the north struck her, and as she was struck she saw its headlight.

The fact that the gates on the west side of the Western Indiana tracks were raised after the passage of the freight train to the south, operated as an invitation to her to proceed west. Whether she was justified in doing so, and whether she took proper pains to look north and south to see if any train was coming, were questions of fact to be submitted to the jury. "On a motion to take a case from the jury either at the close of plaintiff's evidence or at the close of all the evidence the naked legal question thereby raised in this court is whether or not there is any evidence in the record fairly tending to support the plaintiff's cause of action. It is never a question of the weight of the testimony." *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017; *Chicago City Railway Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087. It cannot be said that in the case at bar the evidence does not tend to show that the appellee was in the exercise of ordinary care for her own safety. In *Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633, we said (page 391, 184 Ill., page 635, 56 N. E.): "It is not a rule of law that the omission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty, * * * and it is the settled rule of this court that it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault, or where the surroundings may excuse such failure." And it is a question for the jury to determine whether, in view of all the surroundings, the injured party is guilty of negligence in failing to look and listen, or whether he is relieved by the circumstances from the duty to look and listen. *Chicago & Alton Railroad Co. v. Pearson*, supra; *Chicago City Railway Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985; *Chicago City Railway Co. v. Barker*, 209 Ill. 321, 70 N. E. 624.

There is also evidence tending to show that the appellants were guilty of negligence such as caused the injury to appellee. The engine or locomotive which struck appellee had the name of the

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Chicago & Eastern Illinois Railroad Company upon it, and was what is called a "dummy" engine—a suburban engine, which had pulled a train into the Dearborn Street Station about that time of night, and was running back to the shop light. The evidence tends to show that it was an empty engine without any cars behind it. The testimony of at least two witnesses of the appellants shows that at the time of the accident the engine was "backing up." There is some conflict in the evidence as to the direction in which this engine was moving and as to the track it was moving on. Appellee's testimony tends to show that the locomotive which struck her was moving north on track No. 1, being the easternmost of the Western Indiana tracks, while the testimony of the appellants tends to show that the locomotive which struck her was going south, and was on track No. 2 of the Western Indiana tracks. The testimony of the appellee also tends to show that, whether this engine was moving north or south, or on the first or on the second track, no bell was ringing, or whistle sounding, or other warning given of its approach. It was 8 o'clock in the evening on September 26th, when the accident occurred, and the night was an exceedingly windy one. The evidence of the appellants tends to show that the bell upon the engine was ringing. The witnesses of the respective parties also contradict each other as to the warning given by the watchman in the tower house. The testimony of appellee tends to show that no bell was sounded from the tower house upon the approach of this empty engine, while the testimony of the watchman in the tower house is to the effect that he did give warning by the ringing of a bell. A policeman, who, upon the night of the accident, had been detailed by the city authorities to investigate it, interviewed the watchman who was in the tower house that evening, and makes the following statement in regard to his interview with the watchman: "He told me the gates were out of order and wouldn't work. Told me it was a Chicago & Eastern Illinois engine going north on track 1. That he did not ring the bell on the tower house because he did not want to confuse her, but shouted at her. Said she was standing almost under the tower. He showed me at that time where she was hit, and where she lay after she was hit. That was about twelve feet north of the south edge of the south sidewalk on Twenty-Fourth Place, about four feet east of track 1. I was a policeman then, and was sent out from the station to investigate the accident." According to the testimony of this policeman, the statement made by the watchman to him on the evening of the accident was directly contradictory to the evidence given by the watchman upon the trial of this case.

It sufficiently appears from the foregoing statement of the testimony that there was evidence tending to prove negligence on the part of the defendant. Accordingly the case was properly submitted to the jury, and the court committed no error in refusing the peremptory instruction to the jury to find the appellants not guilty.

Appellants, however, contend that, although the Appellate

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Court rendered a judgment affirming the judgment of the trial court, yet such judgment should not be regarded in this case as a final determination of the facts, even if there was evidence tending to establish appellee's cause of action. The ground of this claim is that, inasmuch as one of the three judges of the Appellate Court was disqualified from acting by reason of his having presided at the trial of the case, and as the two remaining judges disagreed, there was really no decision of the case by the Appellate Court. It is therefore contended that, the Appellate Court not having made any decision, this court may pass upon the weight of the evidence independently of the question as to what the evidence tends to prove. The general rule is that, where the judgment of the trial court is in favor of the plaintiff and the Appellee Court affirms that judgment, all questions of fact are settled so far as this court is concerned, and we know of no exception to that rule, whether the judgment of affirmance entered by the Appellate Court has been entered by a full consideration of the case by all of the judges or whether it has been entered because of the peculiar state of facts existing here. But whether the judgment of affirmance here entered was of such a character as would justify this court in passing upon the weight of the evidence or not, there is another reason which precludes this court from taking such a course, even if it were justified in doing so under the peculiar circumstances shown by this record. It appears from the bill of exceptions that the appellants (defendants below) took no exception to the action of the trial court in overruling their motion for a new trial. The record, as made up by the clerk, recites that there was a motion for a new trial, and that it was overruled by the court, and the bill of exceptions also makes a statement to the same effect. But nowhere in the bill of exceptions or in the record does it appear that any written reasons for granting a new trial were filed accompanying the motion for a new trial. In *Chicago, Burlington & Quincy Railroad Co. v. Haselwood*, 194 Ill. 69, 62 N. E. 315, we said (page 70, 194 Ill., page 315, 62 N. E.): "The question of the sufficiency of the evidence to support the verdict of a jury and the judgment rendered thereon is not open to review, even in courts having jurisdiction to determine that question, unless a motion for a new trial was made, and the motion overruled, and exceptions thereto preserved by a bill of exceptions." In the case at bar it is recited that there was a motion for a new trial, and that the court denied the same, but no exceptions to such ruling of the court are preserved by a bill of exceptions. Therefore the sufficiency of the evidence to support the verdict and judgment rendered in this case is not before us for consideration. As far back as the case of *Law v. Fletcher*, 84 Ill. 45, we said: "We cannot inquire whether the verdict was unauthorized by the evidence, for the reason that the bill of exceptions fails to show that a motion for a new trial was made by appellant and overruled by the court, and proper exception taken thereto by appellant." See, also, *Illinois Central Railroad Co. v. O'Keefe*, 154 Ill. 508, 39 N. E. 606.

2. Appellants also complain that the court below erred in its rulings upon the evidence. If this question were an open one, it cannot be said that the trial court committed any error upon this subject. A certain physician was put upon the stand as a witness for appellee to testify in regard to her injuries, and upon the cross-examination appellants attempted to discredit the witness by asking him questions in regard to the professional opinions he had given in other suits brought to recover damages for personal injuries against one or more of the present appellants. It was also sought by the appellants to show by the direct examination of certain witnesses that the physician in question was interested as a medical man in a large number of personal injury suits against corporations. This class of testimony the trial court refused to admit. Cross-examination upon independent cases of the same character, and about the same time as the principal case, is not allowed. 2 Taylor on evidence, § 1435; Spencely v. DeWillott, 7 East, 108. The rule is more strict against the use of this kind of testimony in direct examination. The acts and declarations either of strangers, or of one of the parties to the action in his dealings with strangers, are irrelevant. They are what are denominated "*res inter alios actæ*." 1 Taylor on Evidence, § 317. There is nothing in the case of Chicago City Railway Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087, which is opposed to the view here expressed. In that case it was held to be proper to ask a physician on cross-examination in a personal injury case by whom he was paid, etc. But the testimony whose introduction is there justified, applies directly to the relation of the witness to the party in interest and to the particular case, and not to his relation with other parties and other cases. It was there said (page 327, 206 Ill., page 1090, 68 N. E.): "It is always competent on cross-examination to ask a witness if he is in the employ of a party, or if, at the time he rendered the particular service, he was in the employ of such party, for the purpose of showing his relation to the case and his interest in it, as affecting his credibility and weight of his evidence."

As has already been stated, the appellee and a witness named Gaffney testified that when she approached the Pennsylvania tracks the east gate was up. This testimony was admitted without objection at the time by the appellants. At a later stage in the trial, however, the appellants made a motion to exclude the testimony in regard to the east gate being up as being immaterial, and the court refused to grant the motion. It is said that this was error on the part of the trial court. The refusal to exclude the evidence after it was admitted was proper, because appellants introduced testimony themselves for the purpose of contradicting this evidence on the part of the appellee. That is to say, appellants introduced witnesses whose testimony tends to show that the gates were shut or down, and that the appellee entered upon the Pennsylvania tracks by passing between the ends of the gate while closed and the fence post. If the testimony introduced by the appellee had been excluded, such testimony on the part of

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the appellants would have gone to the jury without any contradiction thereof on the part of the appellee.

But, independently of any of these considerations, the rulings of the trial court in regard to the admission and exclusion of evidence cannot now and here be reviewed by this court for the reason that appellants took no exception to the ruling of the trial court in overruling their motion for a new trial. Errors of the trial court in rulings as to the admissibility or exclusion of evidence constitute grounds for a new trial. "It is the duty of litigants to seek this mode of relief in the trial court, and resort to an appeal only in the event the trial judge erroneously refuses to grant a new trial, and such a refusal is excepted to, and the exception preserved." *Chicago, Burlington & Quincy Railroad Co. v. Haselwood*, supra; *Illinois Central Railroad Co. v. Johnson*, 191 Ill. 594, 61 N. E. 334.

3. The judgment in the present case was against the two appellant companies here appealing. It is said by counsel for the appellants that there was no proof of ownership of the track upon which the injury occurred, or of the four tracks west of the town house, by the Chicago & Western Indiana Railroad Company; that, therefore, no liability was shown on the part of that company; that a judgment against two defendants in tort is a unit, and, if there be no evidence against one, and judgment is entered against both, the judgment must be reversed as to both. It is conceded by the appellants that this rule has no application here if the ownership of the four western tracks by the Western Indiana Railroad Company is shown by the testimony. It is well settled that "when injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago & Erie Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *West Chicago Street Railroad Co. v. Horne*, 197 Ill. 250, 64 N. E. 331. In *West Chicago Street Railroad Co. v. Horne*, supra, it was held that, when an injury results from the negligent operation of a railway, whether by the corporation to which the franchise is granted or its lessee, both the lessor and the lessee are liable to respond in damages. All the witnesses introduced by the appellee speak of the tracks west of the tower house as being the tracks of the Chicago & Western Indiana Railroad Company. None of the testimony to the effect that this company owned the tracks was objected to when introduced. It is said by counsel for the appellants that it was mere hearsay testimony, and that no positive proof was introduced as to the ownership of the tracks by the Chicago & Western Indiana Railroad Company. In a case of this kind reputed ownership is sufficient, and such reputed ownership was clearly shown in this case. Here the plea of not guilty was filed, and in an action against a railway company for personal injury, where the declaration alleges that the de-

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fendant company was in possession of the road and operating it, it will be implied conceded by the pleadings, not only that the defendant company was a corporation, but also that at the time of the alleged injury it was operating the particular line of railroad mentioned in the declaration, and that the operators in charge of the train being run on said road were its servants and employees. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 21 Am. St. Rep. 362.

We do not understand that the doctrine of the case of *McNulta v. Lockridge*, supra, was overruled by the later case of *Chicago City Railway Co. v. Carroll*, supra. In the latter case it was distinctly said: "We are clear, however, that, where the matter is not made an issue, and is but inducement to the general charge of negligence averred, slight evidence will be sufficient, uncontradicted, to support the allegation." Here, in this case, the declaration averred that the Chicago & Western Indiana Railroad Company "owned, controlled, and operated a certain right of way," etc. This allegation of ownership was mere inducement to the general charge of negligence, and therefore the evidence which was introduced of ownership, even though it may have been slight, was sufficient to support the allegation of the declaration.

It may be said here, as was said in *Chicago, Burlington & Quincy Railroad Co. v. Warner*, 108 Ill. 538, "no proof is required of facts which everybody is presumed to know." Evidence of common reputation is received in regard to public facts. 1 Greenleaf on Evidence, § 128. The Chicago & Western Indiana Railroad Company is a public service corporation, and with its tracks, trains, lessees, employees, running time, depots, etc., is like a highway or a ferry to the people of the neighborhood where its tracks are located. Any rule of law which would force an injured person to make formal proof of ownership in cases like the present would certainly occasion great inconvenience. *Peoria & Pekin Union Railway Co. v. Clayberg*, 107 Ill. 644; *Chicago, Burlington & Quincy Railroad Co. v. Gregory*, 58 Ill. 272; *Carter v. Gunnels*, 67 Ill. 270; *Central Stock Exchange v. Board of Trade*, 196 Ill. 396, 63 N. E. 740. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[85 S. W. Rep. 344.]

Injury to Boy—Ejectment from Street Car—Pleading—Repugnancy—Election.—In an action against a street railroad company for the death of plaintiff's son the petition charged in the first count that deceased was forcibly ejected from the car by the negligence of the motorman; the second count charged an ejection by the motorman unlawfully striking deceased; the third, that the boy was on the

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public street, and that the motorman negligently ran over him; the fourth, that the boy was run over because the motorman failed to observe the requirements of the vigilant watch ordinance of the city. Held that, owing to repugnancy, it was proper to require plaintiff to elect on which count he would proceed.

Same — Same — Employment—Objections.—In an action against a street railroad company for the death of plaintiff's son, a count of the petition charged that the "motorman and driver" in charge of the car, "to further the business of the defendant as his employer," ejected the boy from the car, etc. Held, that objection to the petition that it did not state that the act of the motorman was within the scope of his employment, not having been made except by an objection to evidence, the petition would be held sufficient on appeal.

Servant's Tort—Scope of Employment—Burden of Proof.—Where the master is sought to be held for the servant's tort, the burden of showing that it was committed in the scope of the servant's duties is on plaintiff.

Ejection of Trespassing Boy by Motorman—Scope of Employment.*—The motorman of a street car, whose only duty is to operate the machinery, was not within the scope of his employment in ejecting a boy who was trying to ride on the running board of the car.

Same — "Drivers" — Application of Statute.—The motorman of a street car is not a "driver," within Rev. St. 1899, § 2864, giving an action for death from the negligence of any "driver of any stage coach or other public conveyance."

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by William Drolshagen against the Union Depot Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann and *Geo. W. Easley*, for appellant.
A. R. Taylor, for respondent.

VALLIANT, J. Plaintiff sues to recover the penalty prescribed by the statutes (section 2864, Rev. St. 1899) for the death of his minor son, caused by being run over by a street car of de-

*As to whether it is within the scope of a servant's employment to eject trespassers from trains or cars, see *Bjornquist v. Boston & A. R. Co.* (Mass.), 13 R. R. R. 786, 36 Am. & Eng. R. Cas., N. S., 786 (no evidence that a railroad employee was managing cars, there being nothing to show that any other person was in control of them at the time, the jury could find that it was within the scope of his employment to keep trespassers away from cars); foot-note appended to *McKeon v. New York, N. H. & H. R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & Eng. R. Cas., N. S., 375 (authority of brakeman); *Polatty v. Charleston & W. C. Ry.* (S. Car.), 10 R. R. R. 16, 33 Am. & Eng. R. Cas., N. S., 16 (scope of employment of engineer assaulting trespasser on train was a question for the jury); *Lake Shore & M. S. R. Co. v. Peterson* (Ind.), 3 Am. & Eng. R. Cas., N. S., 427; *Cox v. Los Angeles Ter. R. Co.* (Cal.), 2 Am. & Eng. R. Cas., N. S., 159 (conductor not wearing badge); *St. Louis S. W. R. Co. v. Huffman* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 157 (authority of train hands); note, 6 Am. & Eng. R. Cas., N. S., 59; *Galveston, H. & S. A. Ry. Co. v. Zantzinger* (Tex.), 16 Am. & Eng. R. Cas., N. S., 679 (authority of engineer); *Highland Ave. & B. R. Co. v. Robinson* (Ala.), 19 Am. & Eng. R. Cas., N. S., 357 (authority of conductor).

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fendant. The petition is in four counts. In the first it is stated that the boy was on the car, and was forcibly ejected therefrom by the negligent act of the motorman; the second, that the boy was on the car, and was ejected therefrom by the motorman striking him unlawfully, willfully, and with criminal intent; the third, that the boy was on the public street, and the motorman negligently ran the car against him and over him; the fourth that the boy was run over because the motorman failed to observe the requirements of the vigilant watch ordinance of the city. The answer was a general denial and a plea of contributory negligence. Before the beginning of the trial defendant moved the court to require the plaintiff to elect upon which count he would go to trial, because they were inconsistent. The motion was overruled, and defendant excepted.

1. The motion to elect should have been sustained. A plaintiff may state his cause of action in different forms in separate counts to meet any phase of the case which it is anticipated the evidence might show, but in doing so he must not in one count make statements which are so inconsistent with his statements in another count as that the proof of the case as stated in one count disproves that as stated in the other. Repugnancy is as bad in a petition as it is in an answer. *Roberts v. Ry. Co.*, 43 Mo. App. 287; *Enterprise Soap Co. v. Sayers*, 51 Mo. App. 310; *Prownell v. Ry. Co.*, 47 Mo. 243; *Brady v. Connelly*, 52 Mo. 19; *St. Louis v. Allen*, 53 Mo. 49; *Owens v. Ry.*, 58 Mo. 386, loc. cit. 394; *Rinard v. Ry.*, 164 Mo. 270, loc. cit. 284, 64 S. W. 124, 128. The statements in the first and second counts of the petition are so inconsistent with those of the third and fourth counts that, if those in the first two are true, those in the last two must be untrue. If the accident occurred in consequence of the motorman striking the boy on the hand with a blunt instrument, thereby breaking his handhold, and causing him to fall off the running board on which he was riding, as stated in the first and second counts, then it did not occur by running the car against him and over him while he was on the street, or by the failure of the motorman to keep a vigilant watch for him as he approached the car, as stated in the third and fourth counts. Section 626, Rev. St. 1899, authorizes a party to plead alternatively, but these contrarieties are not so pleaded. But as the finding and judgment were for the defendant on the second, third, and fourth counts, perhaps the error in overruling the motion to elect was not prejudicial.

2. The verdict and judgment were for the plaintiff on the first count for \$5,000, and that is the judgment from which defendant has prosecuted this appeal. The first assignment of error is that the first count does not state facts sufficient to constitute a cause of action, in that it fails to state that the act of the motorman which it is alleged caused the injury was within the scope of his employment. This point was made at the trial in the form of an objection to any evidence under this count for that reason. The objection was overruled, and exception

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taken. The averments of the first count are that the plaintiff's son was standing on the running board of the moving car, holding with his hands to a bar running lengthwise along the side of the car, when the "motorman and driver" in charge of the car, "to further the business of the defendant as his employer," ejected the boy from the car by striking him upon the hand and arm with a blunt instrument, thereby causing him to lose his hold, and to be thrown and fall from the car and be run over and killed. The words above quoted, "to further the business of the defendant as his employer," are the only words in the petition which it is claimed charge that the act alleged to have been done by the servant within the scope of his employment. If the pleader, when he wrote those words, was intending to make a positive declaration that the act was within the scope of the servant's employment, he could have found other words that would have expressed the idea with more certainty. But we have frequently said that where objection is not made to a petition until the trial is about to begin, if the petition is susceptible of a construction that will constitute it a good pleading, it will be so construed; and we are inclined to take that view of this petition. But if it should be conceded to the plaintiff that his petition, under the circumstances, is sufficient, still the defendant's objection arises again in another form; that is, that there was no evidence on the subject of the motorman's duties, or as to the scope of his employment. In answer to this position the counsel for respondent in his brief says: "Here in this record we find the offending motorman in this case actually on the car at his place of duty, actually controlling the movement of the car, holding, as appellant urges in his brief, the relation of driver, for he urges that he holds the same relation to the street car that an engine driver holds to the engine and train. He has control of the brakes and stopping appliances of the car much the same as the engine driver of the engine. The car moves by his acts; the car stops by his act. He receives passengers; he discharges passengers; that is, he does the essential acts connected with this vital part of the business of the operation of the car. This appears in the record in connection with the duties of the motorman." Those facts do appear in the record, or are inferable from what does appear. So far as the receiving, carrying, and discharging of passengers is controlled by the running, stopping, and starting of the car, the business is in the care of the motorman; but, if the motorman has any authority over the passenger other than that which necessarily arises out of his control of the movement of the car, there is no evidence of it in this record, and therefore our only information on the subject must be derived from common experience with a public contrivance in almost universal use. Drawing on this common experience, the counsel for respondent says that the motorman stops the car to receive and to discharge a passenger, he stops at signals of persons on the street desiring to become passengers, and in this his duties are different from those of the driver of an engine on a

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steam railroad. A street car, unlike an express train on a steam railroad, is designed to stop at every street crossing, if there is a passenger to be received or discharged there. The motorman takes the signal from the man on the street, and stops to allow him to board the car. But steam railroads also have stations at which the train stops on signal, and at such a station the signal is given to the man driving the engine, and he stops his train to receive the passenger. When a stop is to be made to allow a passenger to leave the car or train, the passenger does not signal the motorman or the engine driver, but he makes his wish known by signal or otherwise to the conductor, and the conductor gives the signal to stop. The duties of the man in the cab of the locomotive engine and the man on the front platform of the street car, with the electric controller in his hand, although varying to suit the respective conditions, are in many respects of quite similar nature, and therefore the illustration suggested in the brief of counsel for appellant of an engine driver undertaking with violence to eject a passenger, or a trespasser for that matter, from the train, is worthy of consideration. In the case of a passenger, whom the engine driver might assault, or forcibly eject from the train, the carrier would be liable, but on a different principle from that we are now considering. He would be liable because the passenger is in his care as carrier, and is entitled to his protection, even from strangers. But the liability of the carrier in that case is that of a carrier, not that of a master responding for the act of his servant committed in the line of his duty. In the case at bar it is not alleged, and it is not claimed, that the plaintiff's son was a passenger. The ground on which the defendant is sought to be held is that this alleged wrong was done by the defendant's servant in the line of his duty to his master. In such case the burden is on the plaintiff to show that the act complained of was within the scope of the servant's duties. In the absence of evidence on the subject, we are unable to say that a motorman, whose only apparent duty is to operate the machinery that furnishes the motive power for the car, has any authority from his master to eject a person from the car. We cannot see any connection between the apparent duty of the motorman to operate the machine and the alleged authority to eject passengers or trespassers from the car. If there is such authority in the motorman, its source is independent of his mere duty to operate the machine; it does not flow from that duty. If the motorman should be called on by the conductor to assist in preserving order or ejecting a person from the car, then a different case would be presented, in which the duties of the conductor and his right to call for assistance would be involved. And, even if the motorman acted on his own motion to eject a person whose conduct seemed to render it necessary for the protection of the passengers or the preservation of the peace, a question of authority implied from such an emergency might arise. But that is not the case at bar. Here the boy, according to plaintiff's story, was injuring no one, and threatening injury

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to no one, unless it was to himself in attempting to ride on the upturned edge of the running board. The cause of, or excuse or pretext for, the alleged assault by the motorman is unexplained by any circumstance in the case. This case falls within the rules of law laid down by this court in *Farber v. Ry.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, wherein it was held that the railroad company was not liable for the act of a brakeman who caused the alleged injury to the plaintiff by forcing him off a moving freight train on which he was a trespasser, in the absence of evidence showing that the act was within the scope of the brakeman's employment.

Respondent quotes the language of the statute (section 2864) under which the suit is brought, and relies on the term "driver" therein used as including in its meaning a motorman, who in fact is the driver of the machine as the man in the cab is the driver of the locomotive engine. The language relied on is: "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat or any of the machinery thereof, or of any driver of any stage coach or other public conveyance whilst in charge of the same as driver," etc. The petition was drawn with that "driver" idea in mind. It declares that the "defendant's motorman and driver in charge of said car, and whilst acting as such motorman, and undertaking to further the business of his employer, ejected the plaintiff's son from said car by striking him," etc. The learned counsel, in his brief, says: "The single requirement of this statute is that the servant whose negligence causes the injury should be in charge of the public conveyance [the car] as a driver. We submit that this motorman performed the precise function of a driver of a car. He drove the car. He controlled its movements as a driver. Counsel for appellant likens his position on the car to an engine driver. He then was in charge of the car as a driver." When we call a motorman or a man who operates a locomotive engine a driver we are conscious of using that word in a somewhat artificial sense. The term "driver" is not as commonly used in this country to designate one who operates a locomotive engine on a railroad as is the term "engineer," although, perhaps, the former is nearer the original signification than the latter. But the word "driver" was not used in this statute in that sense. In the beginning of the sentence words more aptly describing an agent or servant operating an engine or other machine moving a car or train or steamboat are used, and after those words come the mention of the stage coach, and the like of it, in these words: "or of any driver of any stage coach or other public conveyance whilst in charge of the same as driver," etc. This statute was enacted in this state in 1855, long before electricity was used as we now use it, and long before there was in common service

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what we now call a motorman. But in those early days a stage driver was a personage as well known as an innkeeper, and his authority was known. When the public stage driver was on the road with his coach, there was no one present over him in authority. He was pro hac vice the corporation or stage coach company itself. His title was driver, but driving the horses was not his only duty. He was, as driver, in charge of the coach. This clause of the statute was aimed at him, and to prevent a company from avoiding liability by running a vehicle that was not called a stage coach the words "or other public conveyance" were added, the meaning of the clause being, "or of any driver of any stage coach or other public conveyance [ejusdem generis] whilst in charge of the same as driver." The motorman does not come under that clause, because he is not in charge of the car, and he does not occupy towards the corporation and the public the position of the driver of a stage coach or other vehicles of that kind.

We are better satisfied to leave this case resting on the failure to show the motorman's authority from his employer to do what he is accused of doing since we have looked into the evidence, and are convinced that there is no reasonable ground to believe that the motorman was guilty of the act charged. The overwhelming evidence shows that the boy was not on the car at all, but that he tried to cross the street so close in front of the car that it was impossible for the motorman to prevent striking him with the car and running over him.

The judgment is reversed, and the cause remanded to the circuit court to be tried de novo. All concur, except ROBINSON, J., absent.

SOUTH CHICAGO CITY RY. CO. v. KINNARE.

(Supreme Court of Illinois, June 23, 1905.)

[75 N. E. Rep. 179.]

Limitation of Actions—Amendment—New Cause of Action.—In an action for death, the original declaration alleged that the negligence was that defendant so carelessly operated a car that it ran against deceased, and knocked him off his bicycle, and he was thereby so seriously injured that he died; and thereafter an additional count was presented, stating that defendant so negligently ran the car that, as a direct result, deceased was brought in collision with the car, and knocked off his bicycle, and so seriously injured that he died. Held, that the negligence charged in the original count and that charged in the additional count were the same, and hence a plea of limitations to the additional count was properly overruled.

Negligence—Care Required.*—The law does not demand that one in a place of danger shall exercise the highest degree of self-posses-

*See foot-note appended to *Southern Ry. Co. v. Horine* (Ga.), 15 R. R. R. 427, 38 Am. & Eng. R. Cas., N. S., 427; note, 2 Am. & Eng. R. Cas., N. S., 301; *Kansas City-Leavenworth R. Co. v. Langley* (Kan.), 15 R. R. R. 433, 38 Am. & Eng. R. Cas., N. S., 433 (failure to

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sion, coolness, and skill, but only such as an ordinarily prudent and careful person would exercise in like situation and under like circumstances.

Street Railroads—Collision with Traveler—Contributory Negligence.—In an action for death owing to a collision between defendant's car and a bicycle which deceased was riding, held, that the question of contributory negligence was one for the jury.

Same—Question for Jury.—Where a pleading charged that defendant's servants negligently placed deceased in a position of great peril, whereby while exercising ordinary care, he received his injuries, it was for the jury to determine, whether under the influence of sudden fear, he so conducted himself as to incur the imputation of contributory negligence.

Same—Instructions—Care Required of Traveler.—In an action for death owing to the negligence of defendant railroad company, the court instructed that the plaintiff could not recover unless deceased was in the exercise of ordinary care (meaning thereby that he was required to exercise such care for his own safety not only at the time of the injury, but during the time and circumstances preceding the injury), and that, if deceased failed to exercise care for his own safety in going into the position he was in when injured, the jury should find for defendant, the same as if plaintiff had failed to exercise care at the precise instant of the injury. Held that, in view of such instruction, another instruction—that ordinary care is that which an ordinarily prudent person, situated as the deceased was before and at the time of the accident, would exercise for his own safety—was not erroneous on the theory that it assumed that plaintiff was not guilty of contributory negligence in being in the position in which he found himself at the time of the injury.

Appeal from Appellate Court, First District.

Action by Frank T. Kinnare, as administrator of Paul Christensen, deceased, against the South Chicago City Railway Company. From a judgment of the Appellate Court (96 Ill. app. 210) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied October 11, 1905.

James W. Duncan and *C. Le Roy Brown*, for appellant.
Wing & Wing and *James C. McShane*, for appellee.

BOGGS, J. On the ground that servants of the appellant company negligently caused the death of Paul Christensen, the appellee, as administrator of his estate, recovered in the circuit

exercise best judgment by one placed in position of danger through negligence of another was not contributory negligence); *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 14 R. R. R. 602, 37 Am. & Eng. R. Cas., N. S., 602 (failure to exercise ordinary care to avoid consequences of defendant's negligence); *Kentucky & I. Bridge Co.'s Receivers v. Montgomery* (Ky.), 2 R. R. R. 405, 25 Am. & Eng. R. Cas., N. S., 405 (definition); *Read v. City & Suburban Ry. Co.* (Ga.), 3 R. R. R. 278, 26 Am. & Eng. R. Cas., N. S., 278 (degree of care required for self-protection); *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188 (care required in order to escape imputation of contributory negligence); *Cooper v. Georgia, C. & N. Ry. Co.* (S. Car.), 16 Am. & Eng. R. Cas., N. S., 12 (definition); *Stephani v. Southern Pac. R. Co.* (Utah), 14 Am. & Eng. R. Cas., N. S., 575 (failure to use reasonable care is); *Bodie v. Charleston, etc., Ry. Co.* (S. Car.), 22 Am. & Eng. R. Cas., N. S., 818 (erroneous definition).

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court of Cook county a judgment in the sum of \$5,000. The Appellate Court for the First District affirmed the judgment, and the cause is here on a further appeal.

After the expiration of more than two years from date of the alleged negligence the appellee presented an additional count to his original declaration. The appellant company interposed a plea of the statute of limitations, to which a demurrer was sustained—erroneously, as it insists. The original declaration contained one count. The negligence alleged therein was that “the defendant, through certain of its servants then and there in charge and control of one of its said electric street cars being operated by it upon said street railway as aforesaid, then and there so negligently, carelessly, and improperly ran, managed, and operated said street car that said street car thereby then and there ran against and struck the said Paul Christensen and knocked him off his bicycle upon the ground, and he was thereby then and there so seriously and permanently injured that he died, as a result of his said injuries, a short time afterwards.” The negligence charged in the additional count was that the appellant company “so negligently, carelessly, and improperly ran, managed, and operated said street car that, as a direct result and in consequence thereof, the said Paul Christensen was brought in collision and contact with said street car, and was thereby then and there knocked off his said bicycle on to the ground there, and was thereby then and there so seriously injured that he died as a result of his said injuries.” The negligence charged in the original count and that charged in the additional count are the same, namely, the negligent, careless management and operation of the street cars. The mode or manner in which such alleged negligence caused the death of appellee’s intestate is somewhat differently stated. The cause of action is the thing done or omitted to be done, from which the right of action arose (*Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Illinois Central Railroad Co. v. Campbell*, 170 Ill. 163, 49 N. E. 314); and as to this the allegations of the original and additional counts are not different. There was no error in sustaining the demurrer to the plea of the statute of limitations.

The refusal of the trial court to instruct the jury, as requested by the appellant company, to return a peremptory verdict in its favor, is urged as ground of reversal. On the 24th day of May, 1896, at about 2 o’clock in the afternoon, the deceased, a man aged about 36 years, and one Peter Brask, a relative, were riding their bicycles northward along the roadway on the east side of Stony Island avenue, in the city of Chicago. This avenue runs north and south, and the appellant company maintained a double line of street car tracks in and along the avenue. A horse drawing a buggy was being driven south on the roadway on the east side of the avenue, and Brask, who was riding slightly in advance of the deceased, turned to the right in order to pass between the buggy and the curb of the roadway. The deceased turned to the left, and while he was on the west side of the buggy, and

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Brask to the east thereof—the buggy being between them—a train of street cars, consisting of a motor car and a trailer, which was operated and controlled by employees of the appellant company was driven at a high rate of speed northward along the east track in the avenue, and passed them. The bicycle on which the deceased was riding came in contact with the side of one of the cars, and he was thrown from his bicycle to the pavement of the street, and sustained injuries which resulted in his death some days later. The collision occurred between Sixty-Ninth and Seventieth streets, and about 50 feet north of Sixty-Ninth Place, which intersects Stony Island avenue on the western side thereof. The space between the eastern rail of appellant's track and the curb of the street was 17 feet. Two feet of this space next immediately east of and adjoining the rail on the east was filled with cinders and slag, and was slightly lower than the roadway of the street, from which it was divided by a wooden plank or curb. The roadway of the street between the cinders and the curb was of a width of not exceeding 15 feet, and was paved with wooden blocks. The buggy was moving along the middle of this roadway. The sides of the cars of appellant's train extended, as variously estimated, from 16½ to 18 inches over the cinders and slag. The space between the buggy and the sides of the cars was about 5 feet. The deceased was in this narrow space when the train of appellant's cars dashed along the track at a speed of from 12 to 15 miles per hour. The evidence fully justified the view that neither of the bicyclists knew the train was in their rear. No warning was given of the approach of the train, nor was the speed of the train slackened in any degree. The bicyclists, when within 10 or 15 feet of the buggy, turned to the right and left, respectively, and the appellant's train was then from 150 feet to 200 feet in their rear. The train, if moving at the rate of 12 miles per hour, would run about 17 feet per second. Witnesses, some of whom were passengers on the train, and others who were standing on the sidewalk to the rear of the bicyclists, saw and appreciated the perilous position in which the deceased would be placed by the on-coming train, and the jury were warranted in believing that the motoneer, had he exercised ordinary care, would have realized that unless warning should be given of the approach of the train, or the speed thereof slackened, the deceased would be placed in a position of great danger in the narrow space between the train and the buggy. The court could not declare, as matter of law, that the deceased was guilty of contributory negligence, for the reason the evidence tended to show he did not know that the train was approaching, and did not go or intend to go on the track, nor on the ground that the deceased became excited and frightened, and did not exercise proper skill in endeavoring to extricate himself from the perilous place in which he found himself. There was testimony tending to show that while between the train and the buggy the deceased put his hand on the side of the motor car, and that this caused his wheel to "wobble" and to come in con-

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tact with the trailer, which struck him and threw him to the surface of the street. But this act of the deceased could not be deemed contributory negligence as matter of law. What course should have been expected of an ordinarily prudent man under such circumstances was a question of fact. The law does not demand that one in a place of danger shall exercise the highest degree of self-possession, coolness, and skill, but only such as an ordinarily prudent and careful person would exercise in the like situation and under like circumstances. 3 Thompson on Negligence, §§ 3025, 3026.

Thirty instructions, which cover more than 12 pages of the printed abstract, were given as asked by the appellant company. One instruction requested in its behalf was refused. This instruction read as follows: (5) "The court instructs the jury that there can be no recovery against a party for merely frightening or alarming the person injured, and, if you believe, from the evidence that Christensen was injured solely by reason of being frightened or alarmed just before his bicycle came in contact with defendant's car, then you must find the defendant not guilty, even if you believe from the evidence that the defendant, by its servants, produced such fright or alarm on his part." Instructions Nos. 28 and 30 given at the request of the appellant company treated of fright and alarm of the deceased and his consequent conduct as an element of the case, and declared the law on that subject fully and completely. Instruction No. 28 is as follows: "If you believe from the evidence that the plaintiff became frightened or alarmed or confused just before coming into collision with defendant's car on account of getting suddenly into a position of peril, then such sudden peril will not excuse him for a failure, if there was any, to exercise ordinary care, if you believe from the evidence that he brought himself into such position of peril by reason of his own negligence, if he was negligent, or by reason of running the risk of an obvious and serious danger merely to avoid inconvenience." Instruction No. 30 occupies a full printed page of the abstract, and, because of its length, is not here set forth. It declared it to be the duty of the deceased to conduct himself with that coolness and presence of mind that might be expected to be exercised by men of ordinary coolness and prudence under like circumstances. It is urged that neither the original declaration nor the additional count specifies a charge of negligently producing fright and alarm on the part of the deceased, and that for that reason the court committed error in refusing instruction No. 5. The charge in the pleading is that the servants of the appellant company negligently placed the deceased in a position of great peril, and that by reason of such negligence he received his injuries, and that he exercised ordinary care for his safety. His conduct while in a position of danger was a matter of evidence, not of specific allegation of pleading. Whether, under the influence of sudden fear, he so conducted himself as to incur the imputation of contributory negligence, was to be determined by the jury as a question of fact, and did not arise as a matter of pleading.

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Instruction No. 1 given at the request of the appellee was as follows: "The court instructs the jury that ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent person, situated as the deceased was before and at the time of the accident, would exercise for his own safety." As a criticism upon this instruction, it is urged that "it assumes that an ordinarily prudent and cautious person might find himself in the situation that the plaintiff was in at the time of the accident, and assumes that he was not guilty of contributory negligence in being in the position in which he found himself at the time of the injury." We see nothing in the instruction from which any such assumption is indicated. The instruction fairly directed the minds of the jury to the acts of the deceased connected with his going to the left of the buggy and bringing himself into the situation or position in which he found himself at the time he was injured, as well as his conduct while in such position or situation. There is nothing in the instruction which would lead the jury to infer that, if the deceased exercised due care in his endeavors to avoid injury or extricate himself from a position of danger, he might recover, without regard to whether he had by his own negligence brought himself into such position of peril. Instruction No. 11 given at the instance of the appellant company so fully explained the meaning to be given by the jury to the expression found in any of the instructions that the deceased was required to use "ordinary care at the time of the injury" that it would be wholly unjustifiable to suppose that any improper inference could have arisen in the minds of the jury. Instruction No. 11 is as follows: "When the court instructs the jury that the plaintiff can not recover unless Christensen was in the exercise of ordinary care at the time of the injury, the court means that Christensen was required to exercise such care for his own safety not only at the precise time of the injury, but during the time and circumstances preceding the injury as well; and, if you believe from the evidence that he failed to exercise ordinary care for his own safety in getting into the position he was in when injured, it will be your duty to find for the defendant, the same as if he failed to exercise ordinary care at the precise instant of the injury."

We have carefully considered the complaint that counsel for appellee, in the trial court, conducted himself improperly in the course of the examination of the witnesses, and indulged in improper argument in addressing the jury, but we do not find anything which would suffice to justify the view that the cause of the appellant company was thereby unduly prejudiced.

The declaration herein was filed January 7, 1897. The case has been thrice tried before a jury, and nothing is here urged sufficient to show that the litigation should be further prolonged.

The judgment of the Appellate Court is free from error, and is affirmed.

Judgment affirmed.

NORMILE *et al.* v. WHEELING TRACTION CO.

(Supreme Court of Appeals of West Virginia, Feb. 14, 1905.)

[49 S. E. Rep. 1030.]

Action by Wife—Personal Injuries—Joinder.—In an action by the wife for the recovery of damages for personal injuries sustained by her, she may or may not, at her election, join her husband as coplaintiff.

Same—Same—Damages.—When the wife sustains personal injuries, and brings an action to recover damages therefor, she may recover for being prevented from performing and transacting her necessary affairs and business by her to be performed and transacted, if such prevention is the result of the injuries for which she sues.

Personal Injuries—Evidence—Surgical Operations.*—In an action for personal injuries, where, as a result of such injuries, a surgical operation is necessary to be performed, evidence which shows or tends to show that such operation was attended with great difficulty and dangers, and that comparatively few physicians perform such operation, is inadmissible.

Contributory Negligence—Degree of Care.†—A plaintiff, in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual, under similar circumstances, among careful persons of the class to which said plaintiff belongs.

Same—Instructions.—When an action is brought to recover damages for personal injuries sustained by the plaintiff on account of the defendant's negligence, it is not error to omit to instruct the jury as to the law of contributory negligence in an instruction given for the plaintiff, when the court, in giving the defendant's instructions, instructs the jury fully and fairly on that point.

Personal Injuries—Clmateric.‡—It is not error to instruct the jury that the loss of childbearing power is an element of damage to be considered by them in an action for personal injuries sustained through the negligence of the defendant, when such loss is the reasonable and probable result of such negligent act.

Alighting Passengers—Degree of Care.§—Where a street car company stops its cars for the purpose of receiving passengers, it is

*For the authorities in this series on the right to recover on account of future suffering, in actions for personal injuries, see *Chicago & M. Electric Ry. Co. v. Ullrich* (Ill.), 15 R. R. R. 405, 38 Am. & Eng. R. Cas., N. S., 405.

†For the authorities in this series on the question of the degree of care required of a passenger for his own safety, see foot-note appended to *Parks v. St. Louis & S. Ry. Co.* (Mo.), 14 R. R. R. 387, 37 Am. & Eng. R. Cas., N. S., 387.

For the authorities in this series on the question of the degree of care required of a person for his own safety, see preceding case, and foot-note.

‡See *Keefe v. Norfolk Suburban St. Ry. Co.* (Mass.), 13 R. R. R. 792, 36 Am. & Eng. R. Cas., N. S., 792.

§For the authorities in this series on the question of the care due in discharging passengers, see foot-notes appended to *Chesapeake & O. Ry. Co. v. Smith* (Va.), 15 R. R. R. 241, 38 Am. & Eng. R. Cas., N. S., 241; foot-notes appended to *Willworth v. Boston Elevated Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69.

For the authorities in this series on the question of the degree of care required of a carrier of passengers, see *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *South Cov-*

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charged with the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars.

Contributory Negligence.—A case which was proper to be submitted to the jury on the question as to whether or not the plaintiff was guilty of contributory negligence.

Excessive Verdict—Review.—In an action to recover damages for personal injuries, the court will not interfere with the verdict of a jury, on the ground that the damages found are excessive, unless the finding is so manifestly unjust as to show partiality, prejudice, or misapprehension on the part of the jury.

(Syllabus by the Court.)

Error from Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by Annie Normile and husband against the Wheeling Traction Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. M. Russell and Erskine & Allison, for plaintiff in error.

Caldwell & Caldwell, for defendants in error.

SANDERS, J. This is an action brought by Annie Normile and Thomas Normile, her husband, against the Wheeling Traction Company, in the circuit court of Ohio county, for personal injuries sustained by the female plaintiff, which, it is alleged, were caused by the negligence of the defendant company. There was a verdict and judgment against the company of \$9,150, to which a writ of error and supersedeas was awarded.

The first error complained of is that the court improperly overruled the demurrer to the amended declaration. Counsel for the defendant contend that the declaration is bad, because the female plaintiff and her husband are joined therein as coplaintiffs, and that it unites two causes of action, in this: that in each of the three counts of the declaration it is alleged that Annie Normile was hurt in her person, and that she has suffered pain and had become sick, "and by means of which she was prevented from performing and transacting her necessary affairs and business by her to be performed and transacted." There is an endeavor to assimilate the declaration in this case with the one which was before the court in the case of *City of Wheeling v. Trowbridge*, 5 W. Va. 353, but, upon a comparison of these declarations, it will be found that there is a vast difference between them. In the *Trowbridge* Case, one count in the declaration alleged a case in which the wife was the meritorious cause of action, and in the other count "the husband claimed special damages for the

ington & C. St. Ry. Co. v. Smith (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26; foot-notes appended to *Hart v. Seattle*, etc., Ry. Co. (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; foot-notes appended to *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Topp v. United Rys. & Electric Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248.

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loss of the society, comfort, assistance, etc., of his wife, and for money laid out and expended by him in and about the endeavoring to heal and cure her." Where the action is brought by the husband and wife for a wrong to the wife, there can be no recovery for what is special damage to the husband. The court, in its opinion in the Trowbridge Case, says: "The wife may join with the husband when she is the meritorious cause of action, and when the right of action would survive to her if the husband died before the amount of damages was received. But where the husband alone is entitled to the damages, and in case of his death they would go to the personal representative, then the husband should sue alone." The loss of the society, comfort, and assistance of the wife, and money expended by the husband in endeavoring to heal her, could alone be sued for by the husband; but very different is the declaration in the case before us. There is no claim made by the husband for damages, and the allegation therein contained, "and by means of which she was prevented from performing and transacting her necessary affairs and business by her to be performed and transacted," is not an element of damage for which the husband alone could sue; but if so at the time of the decision of the Trowbridge Case, certainly not so now, because, at common law, and when that case was decided, and until the act of the Legislature of 1891, p. 328, c. 109, § 14, the earnings of the wife during coverture were the property of her husband, but by the said act of 1891 the common-law rule was abrogated, so that now the earnings of the wife, and any and all property purchased by her with the proceeds of said earnings, are her sole and separate property, so that her business affairs and transactions, and whatever might result from them, does not belong to her husband, and if she is interfered with in her business transactions, and for that reason unable to earn what she otherwise would have earned, the damage is personal to her, and such damages can be recovered by her in an action alone, or jointly with her husband.

The other reason assigned why the demurrer should have been sustained is that it was improper to join the husband and wife as coplaintiffs. At common law the action to recover damages for personal injuries to the wife must be brought in the names of the husband and wife jointly, the cause of action being in the wife, and surviving to her in case of the death of the husband; but this common-law rule has in a large measure been abrogated by the various married woman's acts. A married woman is allowed to sue in her own name to recover damages for personal injuries to herself, where the ground of the action is her injury and suffering; and also the same rule applies in actions concerning her separate property; but in a few of the states the common-law rule in this respect has not been altered, and the wife is still required to join her husband as coplaintiff. And, in most of the states where the common-law rule has been abrogated by permitting the wife to sue alone for personal injuries, it is held to be imperative, depriving the husband of any interest in the suit

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and forbidding his joining therein, but in many of the states the statute is deemed permissive, and merely allows the wife to either sue alone or join her husband, at her election. *Palmer v. Davis*, 28 N. Y. 242; *Draper v. Stouvenel*, 35 N. Y. 507; *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172; *Corcoran v. Doll*, 32 Cal. 82; *Reinheimer v. Carter*, 31 Ohio St. 579; *Kennedy v. Williams*, 11 Minn. 314 (Gil. 219); *Gee v. Lewis*, 20 Ind. 149; *Kramer v. Conger*, 16 Iowa, 434; *Norval v. Rice*, 2 Wis. 22; *Barr v. White*, 22 Md. 259. But it is the well-settled practice in this state, and has been since the question was first presented to our courts, that the wife may or may not, at her election, join her husband with her in an action concerning her separate estate. *City of Wheeling v. Trowbridge*, supra; *Wyatt v. Simpson*, 8 W. Va. 394; *Dimmey v. R. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Fox v. Insurance Co.*, 31 W. Va. 374, 6 S. E. 929; *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. 602; *Mathews v. Greer*, 21 W. Va. 694; *McKenzie v. R. R. Co.*, 27 W. Va. 306.

But it is contended that the rulings in this state permitting the joining of husband and wife were made prior to the revision of the married woman's act (chapter 66, Code; Acts 1893, p. 6, c. 3). This is true as to the cases above cited, but the case of *Clay et ux. v. City of Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883, was decided since said act of 1893, but, as counsel says, no reference was made in that case to said act, and for the very reason, likely, that the court did not regard it as making any change in the rule. There is nothing in this statute that changes the rule that the wife may or may not, at her election, join with her husband in an action for personal injuries sustained by her, and, even if it should be doubtful as to what construction ought to be given to it now, the court would give it that construction which makes it permissive rather than imperative, and thereby leave unchanged the practice which is so well settled, especially when, by doing so, no injury therefrom can result to the defendant. The declaration being good, the court committed no error in overruling the demurrer.

In order to deal properly with the other assignments of error, it will be necessary to give a statement of the facts as they appear from the record. The female plaintiff, Annie Normile, who lived at 57 Thirty-Third street, in the city of Wheeling, on the 27th day of December, 1902, started from the home of her mother, at 2310 Market street, where she had been visiting that day, to return home. She had with her a bundle containing a loaf of bread, which she carried in her left arm, and a basket containing a few bottles, canned goods, etc., which she carried on the other arm. She stopped at the corner of Twenty-Third and Main streets to take passage on one of the cars of the defendant company. At that point she met Lloyd Kyle and his wife, with a baby which Kyle was carrying in his arms, who were waiting at the same place for the car. Shortly after she reached that point the car came, and stopped for the purpose of receiving

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passengers, the conductor not being on the platform, at the rear end of the car, where passengers are supposed to enter, but remained in the car, about the middle thereof. Kyle helped his wife on the car, and she opened the door and went in. Kyle, with his baby in his arms, got upon the platform himself; Mrs. Normile attempted to follow him; and when she stepped with one foot upon the step of the car, and after having raised the other from the ground in an attempt to step upon the car, the conductor rang the bell to give the signal for the car to start. At the sound of the bell, Annie Normile dropped her basket on the platform and caught the handle of the car with her right hand. When the car started it did so with a jerk, and threw her so that her right side struck the end of the car. Kyle caught hold of her, but, still having the baby in his arms, his hold gave way, and, after being dragged about 30 feet, with the speed of the car constantly increasing, Annie Normile fell to the ground. As Kyle caught hold of Mrs. Normile, he called twice to the conductor to stop the car, and after she fell he opened the door and told the conductor to pull the bell for the car to stop. When the car was stopped the conductor went back, met Mrs. Normile, and assisted her into the car. The accident occurred on Saturday night, and shortly after Mrs. Normile boarded the car she began to feel sick, and continued to grow worse until on the following Monday morning she went to Dr. Haskins, a physician, who prescribed for her, and the treatment of the physician not having relieved her suffering, and continuing to suffer, in about a week she went to see him the second time. He made some external examinations and made some applications of plasters, and she, not improving from this treatment, shortly afterwards returned, and on the third visit the physician decided that an internal examination was necessary, but, for some reason, at that time Mrs. Normile was not willing to be examined, and the physician says that he thought it was because she was menstruating, but in a few days she returned and the examination was made, which showed that an operation would be necessary, and Mrs. Normile afterwards went to the hospital of Dr. Haskins, where, on the 24th of February, there was performed upon her the operation called "laparotomy." She remained in the hospital for a period of five weeks after the operation was performed, at the end of which time she returned home; this operation being a very severe and dangerous one, and one which comparatively few physicians will perform. At the time of the accident, Mrs. Normile was 23 years old, and up to that time had always been a strong, healthy woman; had always helped to do the housework at home, and, at the time of the accident, was doing her own work, as well as washing for herself and husband. After the accident, and before the operation, she was not able to do any work, and since the operation she has not been able to do any work of any consequence, and, as a result of the operation, she has lost the power of bearing offspring. Dr. Haskins, in his evidence, states that he could not state positively that the operation was made

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necessary as a result of the accident, but he stated that such injuries as she received would in all probability result in such an operation being necessary.

The next assignment of error is that the court erred in overruling the objection of the defendant to certain testimony of the witness Dr. Haskins. Upon the subject of the operation of laparotomy which was performed upon the female plaintiff, her counsel, in endeavoring to show the dangers incident to such an operation, and the gravity of it, and the skill required to perform it, asked the witness certain questions, which, together with the answers, are as follows: "Q. Is laparotomy a specific branch of surgery? A. Well, yes; yes, it is. Of course, you do that and do general surgery too, but at the same time it is a special branch of surgery. A man might be able to amputate a leg very well, and do what we speak of as 'gross surgery,' such as amputations, and not be capable of performing laparotomy for lack of experience and attention to that particular branch of surgery. Q. State whether or not all physicians who have studied surgery perform that operation, or refuse to perform it. A. Oh, there are comparatively few men that perform these operations; comparatively few. Q. Why? A. Perhaps they don't have a taste for it; perhaps they haven't the backbone to tackle it in the first place—I don't know." In the first place, the record shows no objection to the questions, but, after all of the questions were propounded and the answers given, the defendant's counsel entered an objection, but it does not appear what questions were objected to. While we can infer that the objection was intended to refer to the evidence complained of, yet, in order to get the benefit of the ruling of the court, it must affirmatively appear what evidence was objected to. But if there had been an objection to the evidence, it should not have been sustained, because the evidence shows that the operation which was performed upon the female plaintiff was attended with great difficulty and dangers, and that comparatively few physicians perform such operation, which would thereby increase the expense of securing a physician to do the work, and, this being an element of damages which the plaintiff would be entitled to recover, it alone makes the evidence admissible. Then, again, to show that it was such an operation that but very few physicians would perform goes to show the difficulties which attend its performance, and the gravity of it, which would also make the evidence admissible.

At the request of the plaintiff, and over the objection of the defendant, the court gave to the jury two instructions, which constitute the next assignment of error.

"Instruction No. 1. The court instructs the jury that to escape the responsibility of contributory negligence, a plaintiff, in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which such plaintiff belongs."

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There is no objection pointed out to this instruction, and it seems to have been taken from the case of *Dimmey v. Railway Co.*, 27 W. Va. 32, 55 Am. Rep. 292, in which the court gave to the jury an instruction in substantially the same language, and also the court laid down the law in that case to be: "To escape the responsibility of contributory negligence, the plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs." We think this instruction correctly propounds the law applicable to this case. All persons are not chargeable with the same degree of care, and the jury, in passing upon the care that the plaintiff should exercise at the time of the accident, had the right to consider the class to which she belonged, and had a right to take into consideration all of the circumstances surrounding the accident, as they would appear to a person of her class.

"Instruction No. 2. The court instructs the jury that if under the evidence they find the defendant guilty as is in the amended declaration alleged, then, in estimating the damage of the plaintiffs, they have the right to take into consideration the personal injuries inflicted upon the plaintiff Annie Normile, in consequence of the defendant's wrongful acts, if any such injuries are proved, and the pain and suffering, both mental and physical, undergone by her in consequence of such injuries, if such pain and suffering have been proved; and if they further believe from the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts."

The defendant urges two reasons why it was error to give this instruction. One is that it wholly eliminates the question of contributory negligence, and the other is that it instructed the jury that they might consider a feature of the injury which should not have been included in the jury's finding. Taking it that counsel for the defendant is right in saying that the question of contributory negligence is eliminated by giving this instruction, and that it should have presented that question to the jury, still, under the repeated decisions of this court, it is not error when the jury was fully and fairly instructed upon the question of contributory negligence in other instructions. In the instructions given for the defendant the question of contributory negligence was clearly presented to the jury, and it was the duty of the jury, in deciding the case, to take the instructions as given, both for the plaintiff and defendant, and if the instructions, taken and read together, instruct the jury correctly as to the law of the case, there is no error.

Did the court, in this instruction, tell the jury that they might consider a feature of the injury which should not have been included in their finding? This contention is based upon the part of the instruction which tells the jury, "if they further believe from the evidence that the said injuries are permanent, and that

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they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts," and in support of this position the case of *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909, is cited, and in which the rule was definitely stated that the damages which may be recovered are such, and only such, as are the reasonable and probable consequence of the defendant's act. The loss of the power of childbearing is certainly an element of damage to be taken into consideration by the jury, as much so as an injury to any other part of the human body, and the question as to whether or not the injury is the reasonable and probable consequence of the negligent act is a question of fact for the jury. It was for them to say whether or not the operation of laparotomy was made necessary by reason of the accident, and, if so, was the loss of childbearing the reasonable and probable consequence of such negligent act. In the case of *Denver & Rio Grande R. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, it is held: "Thus, when one of the direct consequences of a wound was the loss of the power to have offspring, evidence of the fact was admissible, though the declaration did not directly designate the consequence." Complaint is made that the jury should have been told in the instruction that such damages could not be properly included in their estimate unless the evidence showed that the injury in question was the reasonable and probable consequence of the defendant's negligence. While this instruction does not, in express terms, so instruct the jury, yet the language used in the instruction is sufficient to guide the jury to a proper conclusion in this respect. They are told that they can consider this feature of the injury if it resulted from the wrongful act of the defendant—not that if it is a reasonable and probable consequence of the negligent act, but, as a matter of fact, if the loss of childbearing was the result of the defendant's wrongful act, the jury were told that they could consider this in estimating the damages. For the reason given, we find no fault with this instruction.

The remaining question to be determined is whether or not the verdict of the jury is supported by the evidence. The negligent act complained of is that the defendant company did not exercise due and proper care in the management of its car at the time the plaintiff Annie Normile attempted to take passage thereon. It will be observed from the facts that at the time the plaintiff, Annie Normile, attempted to board the car, and after she had stepped upon one of the steps with her right foot, and while in the act of stepping up with her left foot, and after she had raised it off the ground, the conductor gave a signal for the car to start; that Mrs. Normile thereupon became excited, dropped her basket upon the platform, and the sudden movement of the car threw her against the rear rail of the landing. At that time Kyle, who had preceded her, and who had stepped up onto the platform, endeavored to assist her, but not being able to

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render her sufficient assistance, and the speed of the car constantly increasing, his hold upon her loosened, and, after being dragged a considerable distance, she was thrown from the car into the street. It is the duty of a street railway company, when stopping its cars for the purpose of the reception of passengers, to use the highest degree of care to see that those who are intending to take passage thereon have safely boarded the cars before giving the signal to start. If the conductor in this case had been at the proper place and exercised the proper care, this injury would have been avoided; but, on the other hand, instead of being at a place where his duty called him, and where he could see that all intending passengers were safely on board the car before giving the signal to start, he remained in the car, and, before the female plaintiff had an opportunity to embark, the car was, under his order, started. It is no excuse for the conductor that he did not see that Mrs. Normile had not safely boarded the car, because the law imposes upon him the duty to see, and his failure to see does not excuse the company. The authorities are abundant to sustain the view that it is the duty of a street railroad company, when it stops its cars at a regular stopping place to receive passengers, to see that they are safely aboard before starting the car. In the case of *Terminal Co. v. Morris' Adm'r*, 44 S. E. 719, decided by the Supreme Court of Appeals of Virginia, the court says: "It is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars." In *Nellis on Street Surface Railroads*, page 458, etc., it is said: "It cannot be said, however, that it is inconsistent with ordinary care and caution for a person to board a street car while it is in motion. Whether one has or has not exercised reasonable care or caution in so doing, is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury. * * *

If the passenger be in good physical condition and unincumbered, he may without negligence attempt to board a slowly moving car under all ordinary circumstances, and it will be even a question for the jury if in boarding he was negligent in not holding fast to the hand rail provided for the purpose of aiding him to board. * * *

But one with packages in both hands, as an umbrella in one hand and a handkerchief in the other, may attempt to board a slowly-moving electric car without being negligent as matter of law." In the case we have here, the car had been stopped, as it was the duty of the company to do, and, while the female plaintiff was somewhat incumbered with the basket on one arm and the package on the other, yet the car was standing still at the time she attempted to take passage, and, if it had been permitted to remain so until she could have boarded the car, there would have been no injury sustained by her. She had the right to rely upon the company, that it would exercise due and proper care, and that it would not, while she was endeavoring

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to board the car, start, or give a signal to start, the car. Much stronger is her case than are the cases referred to in the authority just cited. There it will be observed that the passengers were attempting to board a moving car, and even there the court held that it was a question of fact for the jury. "It is the duty of a conductor, before giving the signal to the employee controlling the power to start, after the car has stopped to take on passengers, to look around and see that all passengers to take passage at that place are safely on board, and failure so to do is not excused by the fact that he does not see an intending passenger. The car must wait a reasonable time, and a passenger, diligent in attempting to get upon it while it is stopped to receive passengers, though lacking in dexterity, may recover for injuries sustained from the starting of the car while he is attempting to board it. If the car be started when the employees knew, or by the exercise of ordinary care could have known, that the passenger was attempting to board, the company may be made liable for injuries sustained by the intending passenger. He has the right to rely on the due care of the company, and is not bound to anticipate that the car will start suddenly and throw him upon the ground, or against poles or other obstructions in close proximity to the track." Nellis, *Street Surface Railroads*, p. 161, etc. "And the fact that a person's movements are somewhat incumbered by packages in hands may reasonably require more delay and care in starting the train, in order to assure his safety, as in the case of aged or infirm persons." Clark's *Accident Law*, 27. And it is held, in the case of *Cohen v. West Chicago Street Railway Co.*, 60 Fed. 698, 9 C. C. A. 223, that "a conductor of street cars, having the safety and even the lives of the passengers in his keeping, has not discharged his whole duty to the public when he has stopped his train and waited what might appear, according to his schedule, a reasonable time for passengers to embark. * * * He is bound to know, when he starts suddenly and with full force, that no person attempting to embark is at that moment with one foot on the platform and the other on the ground, and with his hand upon the rail, in the act of getting on board." There seems to be no question, from the facts in this case, applying the rules of law to them, but what the defendant company failed to exercise that due and proper care that it should have exercised at the time that Annie Normile attempted to take passage on its car.

But the defendant urges that, even if it was negligent, the plaintiff, Annie Normile, was likewise negligent, and, if the injury complained of was the result of the mutual fault of the defendant and Mrs. Normile, that then she is not entitled to recover, and that there was no material conflict of evidence in this case, and that the question as to whether she was guilty of contributory negligence was a question of law for the court, and that the court should not have submitted the question to the jury. We cannot say that Mrs. Normile was guilty of contributory negligence. At the time she attempted to board the car it was standing still,

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and she had the right to rely upon its so remaining until she had time to embark and reach a place of safety. She had a basket upon one arm and a bundle in the other, it is true, and was thereby unable to take hold of the railing; but this cannot be attributed to her as a negligent act. She had the right to attempt to enter the car without taking hold of the railing, and could have done so with all ease, and without a particle of danger, if the conductor had discharged his duty towards her by permitting the car to remain standing until he knew she was in a place of safety. But it is said she heard the signal for the car to start, and knew what it meant, and that she should then have stepped off. It may be that she could have stepped off without danger to herself, or it may be that she could not have done so; as to this, we cannot say from the evidence. She had to determine this question for herself, and she is not chargeable with doing wrong if she did not do the wisest and best thing under the circumstances. If she acted as a reasonable and prudent person would have acted under like circumstances, she cannot be held guilty of negligence. After the car started suddenly and struck her on the right side, she was probably in a very poor frame of mind to decide, upon a moment's reflection, what course she ought to take. *Barber v. Ohio River R. R. Co.*, 51 W. Va. 423, 41 S. E. 148; *Tuttle v. Atlantic City R. R. Co.* (N. J.) 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491. "A railroad company cannot be excused from gross negligence on its part, although the act of the injured contributed thereto, unless it be shown in evidence that such person was guilty of legal negligence; that is, some act of negligence that an ordinarily prudent person would not have been guilty of under the same circumstances." *Meeks v. O. R. Ry. Co.*, 52 W. Va. 102, 43 S. E. 120. "When one, by the negligence of another, is so placed that he must choose on the instant, in the face of grave and impending peril, between two hazards, and he makes such choice as a person of ordinary prudence might make, his choice cannot constitute contributory negligence." *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162. Also, see, *Dimmey v. R. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Hoffman v. Dickinson*, 31 W. Va. 154, 6 S. E. 53. There are cases in which the question of contributory negligence is a question for the court, but, in order to make it such a case, the evidence to establish the contributory negligence must be so clear that the minds of reasonable men, free from bias and prejudice, could not come to but the one conclusion. In this case the evidence does not warrant such a position, but the case is one which was proper to be submitted to a jury, and, the jury having found upon this evidence in favor of the plaintiff's, its finding must be accepted as correct.

It is claimed that the damages are excessive. The question of the assessment of damages in cases of this kind is peculiarly within the province of the jury; and when the jury takes into consideration the injury that the plaintiff, Annie Normile, sustained, the continued pain and suffering which the evidence

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shows that she underwent, and the painful and dangerous operation that was necessary to be performed upon her, and the fact that it has left her in a delicate condition and unable to bear children, are all facts upon which the jury had the right to base its finding; and we cannot say that the amount found by its verdict is excessive. And, for the foregoing reasons, the judgment of the circuit court is affirmed.

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(Supreme Court of Appeals of Virginia, March 9, 1905.)

[49 S. E. Rep. 971.]

Fires Set by Locomotives—Presumption of Negligence—Burden of Proof.*—Where it is shown that a fire was set by a locomotive, the railway company is presumptively guilty of negligence, and it has the burden of proving that it used the best mechanical contrivances in known practical use to prevent the escape of fire, and exercised reasonable precaution in selecting competent employees and in operating its train.

Same — Negligence — Weather Conditions — Speed.† — A railway company, in regulating the speed of its trains, must consider the dryness of the season, the strength and direction of the wind, the danger to adjacent property, and the surrounding circumstances which increase the danger from fire thrown out by the engines; and a high rate of speed, when taken in connection with the circumstances, may be negligence.

Same—Same—Same—Same—Proximity of Property.†—Where, in an action against a railway company for the destruction of property

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a fire is set by a railroad locomotive, see foot-notes appended to *Dyer v. Maine Cent. R. Co. (Me.)*, 14 R. R. R. 757, 37 Am. & Eng. R. Cas., N. S., 757; foot-notes appended to *Anderson v. Oregon R. Co. (Ore.)*, 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

For the authorities in this series on the question whether the burden is on the railroad to prove that the engine setting a fire was properly equipped, see foot-note appended to *Chicago, etc., R. Co. v. Beal (Neb.)*, 8 R. R. R. 468, 31 Am. & Eng. R. Cas., N. S., 468; *Dyer v. Maine Cent. R. Co. (Me.)*, 14 R. R. R. 757, 37 Am. & Eng. R. Cas., N. S., 757; *St. Louis, etc., Ry. Co. v. Lawrence (Ind. Terr.)*, 9 R. R. R. 414, 32 Am. & Eng. R. Cas., N. S., 414; *Illinois Cent. R. Co. v. Barret (Ky.)*, 2 R. R. R. 566, 25 Am. & Eng. R. Cas., N. S., 566; *Great Northern Ry. Co. v. Coats (C. C. A.)*, 5 R. R. R. 50, 28 Am. & Eng. R. Cas., N. S., 50; *Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)*, 5 R. R. R. 68, 28 Am. & Eng. R. Cas., N. S., 68; *Patterson v. Chesapeake & O. R. Co. (Va.)*, 6 Am. & Eng. R. Cas., N. S., 389; *Alabama & V. Ry. Co. v. Barrett (Miss.)*, 20 Am. & Eng. R. Cas., N. S., 141; *Garrett v. Southern R. Co. (C. C. A.)*, 18 Am. & Eng. R. Cas., N. S., 529; *Farlington v. Rutland R. Co. (Vt.)*, 19 Am. & Eng. R. Cas., N. S., 248.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies relating to fires set by their locomotives (questions of statutory law, damages, and evidence excluded), see foot-note appended to *Lake Erie & W. R. Co. v. McFall (Ind.)*, 15 R. R. R. 407, 38 Am. & Eng. R. Cas., N. S., 407.

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by fire set by sparks from an engine, it was shown that a freight train too heavily loaded for one engine was drawn by two engines at double the speed of the schedule time and up a grade, that the engines emitted an unusual quantity of sparks, that the property destroyed was exposed to danger by reason of its nearness to the track, the dryness of the season, and the strong wind blowing directly to it from the passing engines, and it was not shown that the speed adopted, in view of the prevailing conditions, was a necessity to the railway service or a duty owed by the company to its patrons or the public, the question whether the company was guilty of actionable negligence was for the jury.

Error to Circuit Court, Warren County.

Action by R. S. Fritts against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Downing & Richards and *Marshall McCormick*, for plaintiff in error.

Scott & Staples, for defendant in error.

HARRISON, J. This action was brought to recover damages for the destruction of certain property of the plaintiff, alleged to have been caused by fire communicated from the engine or engines of the defendant company, in consequence of its negligent equipment, management, and operation of such engines.

There was a demurrer to the evidence of the plaintiff, and thereupon the jury assessed his damages at \$2,366.70, subject to the opinion of the court upon the law. Upon consideration thereof, the learned judge of the circuit court overruled the demurrer, and gave judgment for the plaintiff in accordance with the verdict of the jury. From this judgment the case is before us for review.

No reasonable doubt can be entertained that the fire was set out by sparks from the engines of the defendant. Where this fact is established, the law is well settled that the railway company is presumptively chargeable with negligence, and must assume the burden of proving that it had availed itself of the best mechanical contrivances and inventions in known practical use to prevent the burning of property by the escape of fire, and had exercised and observed every reasonable precaution in selecting competent employees and in operating its trains. *Patterson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *White v. N. Y., etc., Ry. Co.*, 99 Va. 357, 38 S. E. 180.

Assuming that the defendant has shown that it had availed itself of the best mechanical contrivances to prevent the burning of property by the escape of fire, and had observed reasonable precaution in the selection of its employees, we come to the real question at issue—whether or not the defendant was guilty of negligence in its operation of the engines and train here involved.

It appears that the plaintiff, R. S. Fritts, was conducting a mercantile business at Success, a station on the line of the railroad of the defendant company, and that the buildings occupied by

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him for this purpose were wooden structures situated about 35 feet from the railroad track. The fire which destroyed these buildings and their contents occurred on March 26, 1902, at 1 o'clock in the daytime, it being a bright, warm day, and in the midst of a very dry season. At the hour mentioned, a freight train of the defendant, consisting of 30 cars, carrying 841 tons of freight, and drawn by two engines, passed Success going south. The schedule time allowed 15 miles an hour for the speed of the train. It was behind its schedule time, and endeavoring to make it up, and did make up five minutes between White Post and Riverton, a distance of 10 miles.

When the train passed the property of the plaintiff at Success, it was running upgrade at the rate of 30 miles an hour, double its schedule speed, and laboring very hard. The two engines were throwing out an unusual quantity of sparks and cinders, and there was a high wind blowing directly from the engines in the direction of the plaintiff's property.

The question presented is, would the jury, from the facts stated, have been justified in drawing the conclusion that the defendant company was operating its engines negligently?

The defendant insists that the speed of its train was not negligence per se, and that in regulating such speed it was under no obligation to take cognizance of the dryness of the season, the strength and direction of the wind, the danger to the plaintiff's property, nor any of the surrounding conditions and circumstances which increased the danger to others from fire thrown out by its engines; that, if such obligations were imposed, the regular operation of railroads would be impossible.

This proposition is not reasonable, and is not sustained by authority. It is a well-settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Mere rate of speed, though unusual, is not negligence per se. But taken in connection with other circumstances rate of speed may be dangerous, and a dangerous rate of speed is negligence. *C. & O. Ry. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833. In this case Judge Keith says: "We cannot say, as a matter of law, that the mere rate of speed is negligence, although it may be unusual. It is true that 'negligence' is a relative term; that what may be negligence under one condition of facts would not only not be negligence, but the highest prudence, under a different condition of facts. The question for the jury always is, was the act, taken in connection with all of its attending circumstances, negligent?"

It cannot be doubted that it is the duty of a railway company to exercise every reasonable precaution to avoid injury to others by scattering fire along its right of way. It is equally clear, upon principle and authority, that when the danger of doing such injury is increased by the nearness of wooden buildings to its track, the accumulation of combustible material, either on its own or the adjoining land, the dryness of the season, and the direction of high winds, greater caution is required than is necessary when

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such conditions do not prevail. While ordinary care requires the employees of a railway company to recognize such conditions for the purpose of avoiding, as far as possible, injury to others, such care is to be exercised while at the same time giving due consideration to the interest of the railway service and the duty of the company to its patrons and the public. Thompson on Negligence, § 2263; Elliott on Railroads, § 1228.

In the section just cited from Elliott on Railroads, the law is stated thus: "It is a well-settled principle that care in doing any particular act must be exercised in proportion to the danger attending the act. Where the doing of any particular act is attended with unusual hazards, unusual care must be exercised, but, where the performance of the act is attended with only ordinary hazards, a less degree of care is required. These principles have frequently been applied in railway fire cases, for the circumstances under which fires are likely to occur and do occur are so varied that this degree of care must necessarily be employed. In proportion as the hazards increase, there should be a corresponding increase in the care exercised. Thus, it has been held that it is the duty of a railway company, in an unusually dry season, when all inflammable material is like tinder and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons. So, when the wind is blowing directly from an engine towards wooden buildings or combustible material, greater precautions may be required; and when a train is running through a densely populated country or village, where there are a great number of buildings exposed to the hazards of fire, greater precaution must generally be exercised than is necessary when running through the country, where there are no buildings. Unusual precautions are not required, such as the purchase and use of tarpaulins or other similar means to protect against fire."

This statement of the law is fully sustained by the adjudicated cases. *Marvin v. Chicago, etc., R. R. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; *Pittsburg, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Fero v. Buffalo & State Line R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Riley v. Chicago, M. & St. P. Ry. Co.*, 71 Minn. 425, 74 N. W. 171.

The case last cited was an action for damages caused by fire scattered from one of defendant's locomotives. It appeared that the country was unusually dry, and vegetation very inflammable, particularly along that part of the defendant's road where the fire in question occurred; also, that on the occasion there was a very high wind. Upon review, the Supreme Court of Minnesota held that it was not error to instruct the jury that "ordinary care" was a relative term, and depended on circumstances and conditions; that in passing upon the management of defendant's engine they were to consider the conditions then prevailing, such as the dryness of the grasses, stubble, and other vegetation near the track, and the speed and direction of the wind; but, on the other hand, they must give due consideration to the necessities of the

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railway service, and the duty of the defendant to its patrons and the public.

In the case at bar, as already seen, a freight train of the defendant with a load too great for one engine was speeding by the property of the plaintiff at the rate of 30 miles an hour—twice the speed contemplated by its schedule—and emitting an unusual quantity of sparks and cinders. There can be no question that, the harder an engine is worked, the more sparks and cinders it will discharge. The danger of fire is therefore necessarily augmented by the speed of a train, especially when it is pulling upgrade, as it was here. At this time the property of the plaintiff was greatly exposed to danger by reason of its nearness to the railroad, the dryness of the season, and a strong wind blowing directly to it from the passing engines. The burden was on the demurrant to show the exercise of reasonable care in the operation of its train and engines.

It does not appear that the speed adopted, particularly in view of the prevailing conditions, was a necessity to the railway service, or a duty owed by the defendant to its patrons or the public. This was an ordinary freight train, and not one word is offered in explanation of the high rate of speed at which it was moving. The fire was set out by the engines of the defendant, and it was for the jury to say whether or not the act, taken in connection with all the attending conditions and circumstances, was the result of a negligent operation of its engines by the employees of the defendant. A consideration of this question was withdrawn from the jury by the demurrer to the evidence, and we are unable to say that they would not have been justified in finding a verdict for the plaintiff.

Sundry exceptions were taken during the progress of the trial to the action of the circuit court in admitting certain evidence offered on behalf of the plaintiff, and in refusing to strike out certain answers of the witness Robert Grigsby on his cross-examination. In the view we have taken of the case, it is unnecessary to pass upon these exceptions, for, if their solution were in favor of the defendant company, it could not alter the conclusion we have reached.

For these reasons the judgment of the circuit court must be affirmed.

WHITTLE, J., absent.

CHRISTENSEN v. METROPOLITAN ST. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, April 4, 1905.)

[137 Fed. Rep. 708.]

Trial—Direction of Verdict—Questions of Negligence.—While the questions of negligence and contributory negligence are ordinarily questions of fact to be passed on by a jury, yet if it clearly appears from the undisputed facts, judged in the light of that common

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knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict in opposition to it, the case may properly be withdrawn from the jury.

Street Railroads—Care in Equipment of Cars—Screens Protecting Windows.—Screens with large meshes fastened across the lower half of the windows of a street car on the side next to the poles supporting the trolley wires are a sufficient protection against the accidental injury of passengers from such poles, and a sufficient warning of the danger of such injury to absolve the railway company from the charge of negligence in that regard.

Same—Injury of Passenger—Contributory Negligence.*—A passenger in a street car who, on account of a sudden illness, extended her head through a window, above a screen which covered the lower half of the window, and was injured by striking against a trolley pole beside the track, being obliged in order to so reach the window to stand up or kneel upon a seat, was chargeable with contributory negligence, as matter of law, which precludes a recovery against the company for the injury.

In Error to the Circuit Court of the United States for the District of Kansas.

John H. Atwood (Atwood & Hooper and McFadden & Morris, on the brief), for plaintiff in error.

O. L. Miller (Miller, Buchan & Miller, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This is an action brought by Augusta Christensen against the Metropolitan Street Railway Company to recover damages for personal injuries which she alleges were caused by the negligence of the defendant street railway company. The action was commenced in the state court, and removed by the defendant in error to the Circuit Court of the United States for the District of Kansas.

The plaintiff in error (also plaintiff below), in her amended petition, alleges, in substance, that the defendant was a corporation duly organized, and at the time of her alleged injury was engaged in maintaining and operating a system of street railway, upon and along certain streets in the cities of Kansas City, Kan., and Kansas City, Mo.; that one of the defendant's branch lines, extending from the Union Depot in Kansas City, Mo., to a station called Riverview, in the City of Kansas City, Kan., was constructed upon an elevated structure along Central avenue in Kansas City, Kan., and across the Kansas river, and along Ninth street, in Kansas City, Mo.; that for the purpose of conducting electricity, which supplied the power for running its cars, the

*As to whether a passenger is guilty of contributory negligence in extending part of his person beyond outside line of the car, see footnote appended to *Huber v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 12 R. R. R. 768, 35 Am. & Eng. R. Cas., N. S., 768.

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defendant, overhead and on a line nearly perpendicular with the center of its tracks, strung a copper wire, known as a "trolley wire," and, in order to hold the wire in position, had, on the side of the track, erected large poles of wood or iron upright; that extending out from the top, or near the top, of each of the poles, was an arm, and to the end of the arm, or near the end of the arm, the trolley wire was fastened. It is further alleged that, to make it reasonably safe for public travel, and to protect the lives of its employees and passengers transported by its cars, it was necessary to place these poles, supporting the trolley wire, at a distance not less than three or four feet from the rail on either side of the track; that, if the poles were placed nearer than that distance to the track, it would be necessary, in order to protect the lives and limbs of its passengers, to place screens or bars on the windows of its cars, to prevent passengers from extending any part of their body outside of the cars. It is further alleged that on the 3d of October, 1900, the plaintiff in error became and was a passenger upon one of defendant's cars, boarding the car north of Riverview Station, and that she paid the conductor the regular fare entitling her to transportation to the Union Depot in Kansas City, Mo. It is further alleged that one or more of the poles used by the defendant, supporting the trolley wire, had been placed nearer than three feet to the side of the track, and was by defendant permitted to remain so close to the track as to endanger the lives and limbs of passengers upon the cars passing along the track, because of the liability of the passengers coming in contact therewith, which fact was wholly unknown to the plaintiff. It is further alleged that the defendant failed to equip and furnish the car upon which the plaintiff was a passenger with screens or bars at the windows to prevent passengers from extending their heads, arms, or other portions of their body out of the car window, or to give any warning whatsoever not to do so. It is then alleged that the defendant's servants in charge of the car upon which the plaintiff had taken passage permitted the car to become crowded and overloaded with passengers to such an extent that the seats in the car were all taken, and the aisle, or space between the seats, was jammed with persons standing therein, who leaned and crowded upon the plaintiff; that, on account of the overloaded and crowded condition of the car and the failure of the employees and servants to properly ventilate it, the air in the car became foul and stifling, and caused the plaintiff to become suddenly sick and dizzy with violent nausea, and, in order not to vomit upon the passengers or persons in the car, plaintiff, without any knowledge or notice that the poles of the defendant were so near the side of the track, slightly extended her head out of the window in the side of the car, near the place where she was sitting, for the purpose of vomiting, and as she did so she received a severe blow on the head by her head coming in contact with one of the poles erected and maintained along the side of the track by the defendant; that by reason thereof plaintiff was rendered unconscious, and remained so for

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a long period of time, was severely bruised and injured in and upon her head, causing subacute meningitis, with effusion into the ventricles of the brain, accompanied by double vision, unequal pupils of the eyes, jerking of the muscles of the extremities, constant headache, sleeplessness, numbness of the extremities, and constipation, by reason whereof she was caused to suffer, and at the time the action was brought was still suffering, great physical pain and mental anguish, and was unable to perform her usual duties. She further alleges that she was seriously and permanently injured, and prayed that she be allowed damages in the sum of \$10,000.

To this petition the defendant answered, first, by a general denial, and, for a second and further defense, alleged that, if the plaintiff received any injury at the hands of the defendant, she so carelessly and negligently conducted and demeaned herself at the time of the accident as to cause or directly contribute to any injury she may have received.

When the case was first called for trial in the circuit court, at the conclusion of the statement made by counsel for plaintiff, counsel for defendant moved for a judgment upon the statement, which application was overruled, and the case subsequently came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant filed a demurrer to the evidence, which, after argument, was sustained by the court, and a judgment was thereupon entered in favor of the defendant. The plaintiff duly excepted to the ruling of the court upon the demurrer to the evidence, and sued out this writ of error to reverse the judgment entered in favor of the defendant.

The evidence set out in the record establishes the following facts: That the trolley wires that carry the current were suspended on cross-arms or brackets on perpendicular poles erected on the elevated structure upon which the tracks were laid; that the distance between these poles and the side of a passing car would vary from six to ten inches; that the seats in the car in which the plaintiff was a passenger ran lengthwise of the car, and were located along the sides of the car, with the back of the seat against the side of the car; that the plaintiff was sitting with her back to a window on the side of the car where she was seated, and facing the opposite side of the car; that the window was down, the upper end of the sash extending about two inches above the back of the seat; that extending across the windows on the outside of the car, and securely fastened to the car, were iron screens covering the windows up from the window sills for a distance of from 14 to 16 inches, leaving an open space of something like 14 inches between the top of the screen and the top of the car window; that the meshes in these screens were about three-quarters of an inch square; that the screens placed across the windows of the car were such that would effectually prevent passengers from being injured by any involuntary action on their part; and that in order to put her head outside of the car window, over this screen, plaintiff would necessarily have to arise

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from her seat, turn about, and either stand or kneel upon the seat.

While a street railway company engaged in the transportation of passengers, as the defendant in this case was, is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances for the protection of its passengers, yet it has a right to assume that passengers patronizing its cars will travel in the usual way, and occupy the seats provided for that purpose, or, if the car is crowded, those standing will occupy the open space, or aisle, in the center of the car between the seats, and in either case the screens upon the windows of the car in which the plaintiff was injured, were entirely sufficient to protect passengers from any involuntary action on their part, such as might be caused by a lurching or swaying of the car while the car was in motion. In other words, we think that the company was not required to anticipate that the plaintiff might become ill and attempt to put her head out of the window, when it would be impossible for her to do so without turning about and either kneeling or standing upon the seat. But it is insisted by counsel for plaintiff in error that because Judge Hook, when the case was first called for trial, declined to sustain a motion for judgment upon the statement of counsel, and that Judge Pollock, upon the trial of the case, decided that the plaintiff's evidence did not authorize a recovery, demonstrates that the case is one where reasonable men may fairly arrive at different conclusions; therefore the case should have been submitted to a jury. The record does not contain the statement made by counsel when the case was before Judge Hook, and it may be, as is generally the case, that in the statement of the case the facts were not as fully disclosed as they were by the evidence when the case was before Judge Pollock.

While the question of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet if it clearly appears from the undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of a jury. *Railroad Company v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Schofield v. Chicago, Milwaukee & St. Paul R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, and cases there cited; *Northern Pacific Railway Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *N. W. Ry. Co. v. Davis*, 53 Fed. 61, 3 C. C. A. 429; *Missouri Pacific Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, and cases cited. In *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287, the Supreme Court said: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."

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While the plaintiff's sudden illness undoubtedly placed her in a very uncomfortable and distressing position, yet that fact would not authorize her to disregard unmistakable warnings of danger. She must have known that the heavy screens which barred the windows were placed there for no other purpose than to prevent passengers from extending their arms or heads out of the windows, as the meshes in the screen were too large to serve any other purpose. To disregard this plain warning was, we think, such contributory negligence upon her part as will necessarily preclude a recovery in this case.

The judgment of the Circuit Court is affirmed.

DRAPER v. EVANSVILLE & T. H. R. Co.

(Supreme Court of Indiana, June 8, 1905.)

[74 N. E. Rep. 889.]

Depots—Duty to Keep Open—Violation of Statute—Pleading.—Since the word "schedule," as used in Burns' Ann. St. 1901, § 5188, requiring a railroad company to keep open its depots for a specified period preceding the arrival of passenger trains allowed "by schedule" to stop, implies that the operation of a train is governed by rule, an allegation, in a complaint in an action against a railroad company for injuries sustained by an intended passenger by reason of being compelled to wait out of doors for a train, that the train was due "to arrive and stop for the taking on of passengers" at a time stated, does not show a violation of the statute.

Same—Same.*—A railroad company agreeing to stop its train at a station to take on a passenger agrees to keep open its waiting room for the accommodation of the passenger while waiting for the train.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Action by Loone Draper against the Evansville & Terre Haute Railroad Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Transferred from Appellate Court under section 1337u, Burns' Ann. St. 1901. Reversed.

Walter F. Wood, for appellant.

Iglehart & Taylor and *Hays & Hays*, for appellee.

GILLET, J. Action by appellant in two paragraphs to recover damages sustained by being compelled to wait out of doors, in inclement weather, for a train, by reason of the fact that appellee's passenger station was closed. A demurrer was sustained to each paragraph of the complaint, and from the judgment which followed this appeal is prosecuted.

*For the authorities in this series on the subject of the duty to keep stations and depots open for the accommodation of passengers, see *St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793 (liability for refusal to unlock waiting room); note, 8 Am. & Eng. R. Cas., N. S., 660.

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It seems to be agreed between the parties that the first paragraph seeks to allege facts showing the violation of a duty under section 5188, Burns' Ann. St. 1901, while the second paragraph is founded on the theory that there was a violation of a common-law duty. Section 5188, *supra*, provides: "That all railroad companies operating lines through towns and cities of one hundred population or more shall provide and maintain suitable waiting rooms * * * for the convenience of the traveling public, and shall keep such rooms open for a period of not less than one hour next preceding the arrival of all passenger trains that are allowed by schedule or flagging to stop at all stations." The allegation of the first paragraph concerning the train for which appellant was waiting is "that it was due to arrive and stop for the taking on of passengers at the said town of Carlisle at about 3:05 a. m." It is a well-settled rule that a pleader who founds his action on a statute must allege facts which bring him within the enactment. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, and cases cited; *Indianapolis, etc., Transit Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, and cases cited. A train may be due to arrive and stop at a station for the taking on of passengers, and yet not be scheduled to stop there; as where it is due to arrive and stop to take on passengers for that occasion only. The term "schedule" implies something written, and when used with reference to a train implies that its operation is governed by a rule, rather than a particular direction or agreement. It is our opinion that the first paragraph of the complaint did not disclose a violation of said statute.

The second paragraph counts on a special agreement between the parties that the company would stop the train at the town of Carlisle on the night in question. Appellee's counsel contend that there is no common-law duty upon the part of a railroad company to provide waiting rooms for persons waiting to take trains, and that therefore a complaint which only discloses an agreement to stop does not disclose a breach of duty in respect to providing a waiting room for the passenger with whom the agreement was made. Distinguishing the case of *People v. New York, etc., R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, upon which counsel for appellee in this case largely rely, it was said by the Alabama Supreme Court, in *Alabama, etc., R. Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354: "Although there may have been no law requiring the railroad to erect an office and platform at Boligee, yet, having done so, and having thereby invited persons having business with it to enter upon its transaction, the law required that they should be adapted to the purpose, and not dangerous, hazardous, or unsafe." It was said by Judge Dillon, speaking for the court, in *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124, 138, 95 Am. Dec. 114: "I have no hesitation in saying that, without any statute enacting it, there is a common-law duty on these companies to provide reasonable accommodations at stations for the passengers who

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are invited and expected to travel on their roads." The duty of railroad companies to keep their waiting rooms and approaches lighted in the nighttime for a reasonable time for the benefit of persons waiting to take passage upon their trains was recognized by this court in *Louisville, etc., R. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794, and, as declared in *Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720, "the principle which requires that lights should be sufficiently provided to avoid the consequences of darkness requires that heat should be reasonably provided for the purpose of avoiding the effects of cold." There can be no doubt that the right of a passenger to shelter from inclement weather has its origin in the same general duty from which springs the company's obligation to keep its waiting rooms and the approaches thereto in proper condition. Once the duty is recognized, and the right of a person who has sustained damages from exposure follows to have the question determined as to whether his injury was proximately due to a negligent omission on the part of the company. As said in *Boothby v. Grand Trunk R. Co.*, 66 N. H. 342, 34 Atl. 157: "Whether injury, by exposure to the weather, of a passenger awaiting in the open air the arrival of a delayed train, was or was not a result which might naturally and reasonably be expected from the failure of the defendants to open and warm their station at an inclement season of the year—or, in other words, whether the defendant's negligence was the proximate cause of the plaintiff's injury—was a question to be determined by the jury." The objection of appellee's counsel to the second paragraph of complaint is not well taken, and, as we have concluded, although not without some hesitation, that, in view of matters of necessary inference from the facts well pleaded the paragraph states a cause of action, we hold it sufficient.

The judgment is reversed, with a direction to overrule the demurrer to the second paragraph of complaint.

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(Supreme Court of Mississippi, May 15, 1905.)

[38 So. Rep. 502.]

Injury to Passenger—Exemption from Liability—Evidence—Pleading.—In an action against a carrier for injuries, where defendant pleaded only the general issue, and gave no notice of any affirmative matter in avoidance, a letter written by plaintiff, requesting a pass from defendant's superintendent, and the pass issued on such request, providing that the person accepting it agreed not to hold the company liable for any damage to his person or property, were properly rejected on defendant's offer, under Code 1892, § 686, providing that affirmative matter in avoidance shall not be proved under the general issue unless defendant give notice thereof in writing, etc.

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Pleading.—Special affirmative matter in avoidance of plaintiff's cause of action is properly rejected when it is sought to inject it into plaintiff's testimony before he has closed his case.

Carriage of Passengers—Exemption from Liability.*—A common carrier cannot contract against liability for damages arising through its own negligence.

Excessive Verdict.—Plaintiff testified that two ribs were broken, his hand, arm, and leg were cut, his back wrenched, his shoulder dislocated, and his arm broken; that he suffered great mental and physical pain, and for two weeks spit up blood; that he was doing a general mercantile business, and had no one to help him, and for about three months his store was closed most of the time, as he was unable to do anything; that he paid considerable sums for medicine and doctor's bills; and that he still suffered from the effects of his injuries, and was in bed about three months. Plaintiff was corroborated by a medical witness. Held, that a verdict for \$10,000 was not so grossly excessive as to indicate passion, prejudice, or corruption on the part of the jury, and hence would not be disturbed on appeal.

Appeal from Circuit Court, Warren County; Geo. Anderson, Judge.

Action by Alex Grant against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Suit by appellee against appellant to recover damages for personal injuries. From verdict and judgment for plaintiff for \$10,000, defendant appeals. On the trial, plaintiff testified that two ribs were broken, his hand, arm, and leg were cut, his back pretty badly wrenched, his shoulder dislocated, and his arm broken, in the wreck of defendant's train; that he suffered great mental and physical pain, and for two weeks spit up blood; that he was doing a general mercantile business, and had no one to help him, and for about three months his store was closed most of the time, as he was unable to do anything; that he paid considerable sums for medicine and doctor's bills; and that he still suffered from the effects of his injuries, and was in bed about three months. Dr. G. Y. Hicks testified that he treated plaintiff for the injuries, and described the injuries substantially as plaintiff did, except he said the ribs were not broken. The opinion of the court contains a statement of such other facts as are necessary to understand the case. Defendant's motion for a new trial was overruled, and it appeals.

Mayes & Longstreet, for appellant.

Plaintiff used the pass, knowing the stipulation on it, and he cannot now be heard, having enjoyed the benefit of it, to claim damages in the teeth of his contract. *Northern R. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake, etc., Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed.

*As to whether a carrier of passengers can limit its liability, or exempt itself from liability, see foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737, where all the preceding authorities in this series are collected.

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742; *Kinney v. Railroad Co.*, 32 N. J. Law, 407, 90 Am. Dec. 675; *Id.*, 34 N. J. Law, 513, 3 Am. St. Rep. 265; *Perkins v. Railroad Co.*, 24 N. Y. 196, 82 Am. Dec. 281; *Wells v. R. R. Co.*, 24 N. Y. 181; *Sutherland v. R. R. Co.*, 7 U. C. C. P. 409; *Rogers v. S. S. Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Payne v. R. R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472. See note to *Muldoon v. R. R. Co.* (Wash.) 22 L. R. A. 794.

McLaurin & Thames, for appellee.

A common carrier cannot exempt itself, by special contract, from liability for tort or negligence, where it undertakes to transport passengers gratuitously on a pass. *Illinois Cent. R. R. Co. v. Crudup*, 63 Miss. 291; *Prince v. I. & G. N. R. R. Co.*, 64 Tex. 144; *Mobile, etc., R. R. Co. v. Hopkins*, 41 Ala. 489, 94 Am. Dec. 607; *Ind. Cent. R. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Jacobus v. St. Paul, etc., R. R. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Dec. 360; *Railroad Co. v. Butler*, 57 Pa. 335; *Railroad Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Carroll v. M. P. R. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Railroad Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Railroad Co. v. Bishop*, 50 Ga. 465; *G., C. & S. F. R. R. Co. v. McGowan*, 65 Tex. 640; *Railroad Co. v. Wier*, 37 Mich. 115, 26 Am. Rep. 499; *Sager v. R. R. Co.*, 31 Me. 228, 1 Am. Rep. 659; *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Cleveland R. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Rose v. Des Moines, etc., R. R. Co.*, 39 Iowa, 246; *Lawson v. Chicago, etc., R. R. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; *Louisville, etc., R. R. Co. v. Oden*, 80 Ala. 38; *Little Rock, etc., R. R. Co. v. Talbot*, 39 Ark. 525.

A. J. McLaurin, for appellee, cited the following authorities: *I. C. R. R. v. Crudup*, 63 Miss. 302; *Prince v. I. G. N. R. R. Co.*, 64 Tex. 144; *M. & O. R. R. Co. v. Hopkins*, 41 Ala. 489, 94 Am. Dec. 607; *I. C. R. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Jacobus v. St. Paul, etc., R. R. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Dec. 360; *Railroad Co. v. Butler*, 57 Pa. 335; *I. C. R. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Carroll v. R. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Railroad Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Bishop*, 50 Ga. 465; *Commissioners v. R. R. Co.*, 108 Mass. 7, 11 Am. Rep. 301; *G., C. & S. F. R. R. v. McGowan*, 65 Tex. 640; *Railroad Co. v. Wier*, 37 Mich. 111, 26 Am. Rep. 499; *Sager v. R. R. Co.*, 31 Me. 228; *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Railroad Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Rose v. Des Moines R. R. Co.*, 39 Iowa, 246; *Lawson v. Chicago, etc., R. R. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; *Little Rock, etc., R. R. Co. v. Talbot*, 39 Ark. 525; *Branch et al. v. Railroad Co.*, 88 N. C. 573.

Cox, Special Judge. The decision of this case hinges upon the determination of the question whether the trial court erred in sustaining the objection of plaintiff, who is appellee here, to the

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introduction of a letter from plaintiff in words as follows: "Hardee, Miss., 3. 28. 1904. Major J. M. Kemp, Superintendent, Greenville, Miss.—Dear Sir: I have an occasion to go to Baton Rouge pretty soon and I would appreciate a pass very much. Date it from April 2nd. to 22nd. Respectfully, Alex Grant, Agent"—and also to the introduction of a pass sent him in response to the above letter, styled, "Employee's Ticket, Pass check for Alex Grant from Hardee, Miss. to Baton Rouge, La.," which provided that "the person accepting this ticket in using the same, agrees not to hold the company liable for any damage to his person or property, under any circumstances whatever," and recited that "employee's passes must only be issued to employees of the Yazoo & Miss. Valley R. R. Co., or of the Railway Mail service, and of the Express, Telegraph, news and sleeping car companies which have regular contracts for service on the Yazoo & Miss. Valley R. R."

Plaintiff in his declaration alleges that a train of defendant, on which he was a passenger, was wrecked by reason of the unsound and unsafe condition of defendant's roadbed, occasioned by rotten or defective cross-ties and a bad frog, and that plaintiff, in the said wreck, received certain severe injuries. The declaration charges that the said defective condition of its roadbed was known to defendant, or could have been by reasonable inquiry or inspection, and had been so for a long time, and that the defendant was willfully, recklessly, and capriciously negligent in the conduct and management of its business, to the great injury and damage of plaintiff. Defendant pleaded the general issue only, and did not give notice of affirmative matter in avoidance.

Under the pleadings the court could not do otherwise than exclude the letter and pass, when offered in evidence. It is provided by section 686, Code 1892, that "if the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial." While, as a rule, great liberality is allowed in pleading and procedure, this statute is mandatory, and must be strictly complied with. The effect of section 686 is to require every affirmative matter to be pleaded specially or given notice of, so as to distinctly inform the opposite party of the precise ground of contest on which he is to be met by his adversary. *Title v. Bonner*, 53 Miss. 578. The evidence offered and excluded had no tendency to disprove either the negligence of defendant, or the resulting injuries of plaintiff. Its utmost and sole effect would have been to show a release of all claim for damages, which was an affirmative fact in avoidance. The exclusion of such evidence under the general issue, if notice in writing be not given, was the chief purpose of section 686. Again, the court did not err in excluding the proffered evidence, because offered at the wrong time. Plaintiff was testifying, and it was sought to inject the

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letter and pass into his testimony. While it was proper to permit plaintiff, on cross-examination, to be questioned about them (and this was not refused), it would have been improper to permit defendant at this stage to introduce its defense, and have it considered by the jury, before the plaintiff had closed his case, and, indeed, before his own testimony was concluded. Defendant failed to offer the letter and pass after plaintiff had rested, and has no right to complain of a ruling of the court which, under any view of the evidence offered, was perfectly correct at the time it was made.

But even if the evidence excluded had been offered under a proper pleading and at the proper time, it would still have been incompetent. It is definitely settled in this state that a common carrier cannot contract against liability for damages arising in consequence of its own negligence. This is the law even in the case of a passenger riding on a free pass, and who has released the carrier from liability for the negligence of its servants. *Ill. Cent. R. Co. v. Crudup*, 63 Miss. 302. It is contended by counsel for appellant that the case last cited does not hold that the acceptance of a free ticket does not debar the right to sue in such case, and that the pronouncement by the court in that case that such a contract is against public policy is mere dictum. We do not so read. The decision in that case rests upon two distinct grounds; a want of consideration for the waiver of damages being one, and the violation of public policy being the other. The decision of the court might have been rested upon either. It was in fact rested upon both. It is supported by what seems to be the great weight of authority; and is in perfect harmony with the decisions of a great number of courts of last resort in the United States. The opposite view is held in England and by the Supreme Court of the United States and by some of the state courts, but we adhere to that view of public policy which is announced in the case last cited. Those desiring to see a marshaling of the two conflicting lines of decision upon the question considered are referred to briefs of counsel in the case.

The sum for which judgment was rendered, \$10,000, is large; but when the very serious injuries suffered by plaintiff, and the severe pain endured by him, are considered, we cannot say that it was excessive. The amount of damages to be awarded in a case of this kind, involving the consideration of both physical and mental pain and suffering, is peculiarly a matter for the jury. The verdict, if excessive at all, is not so grossly excessive as to indicate passion, prejudice, or corruption upon the part of the jury, and therefore will not be disturbed.

Affirmed.

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(Supreme Court of Illinois, June 23, 1905.)

[74 N. E. Rep. 819.]

Direction of Verdict.—Where there is any evidence tending to support the allegations in the declaration, it is not error to refuse to direct a verdict for defendant.

Injury to Street Car Passenger—Jolting—Duty to Warn Passenger.*—Where the conductor of a street car knew that the car would swing around a corner, and knew that it was near the corner when he told a passenger to walk through the car so as to obtain a seat in another car, it was his duty to inform the passenger of the danger of the car making the turn, or to so control the car that there would be no danger in the passenger passing from one car to the other.

Same—Contributory Negligence—Riding on Platform.†—Whether it is negligence for a passenger on a street car to ride on the platform of the car in a case where other passengers are on the platform and people are holding onto the straps inside and the seats are filled is a question for the jury.

Same—Same—Passing from One Car to Another.‡—Whether a passenger on a street car, who passed from one car to another for the purpose of procuring a seat, pursuant to the direction of the conductor, was negligent, held, under the evidence, a question for the jury.

Evidence.—Where on the examination of a witness the counsel for the adverse party stated that he did not object if witness did not go any further, and the examination along that line was discontinued, the adverse party could not assign as error the admission of the evidence.

Same—Harmless Error.—Where, in a personal injury action, competent evidence was admitted showing plaintiff's nervous condition, the error in permitting a witness to state that he knew, without plaintiff telling him, that she was nervous, and that he knew nothing about

*As to the duty to warn and instruct passengers, see *Penny v. Atlantic Coast Line R. Co.* (N. Car.), 10 R. R. R. 606, 33 Am. & Eng. R. Cas., N. S., 606 (duty to warn alighting passenger of danger from disorderly persons who had just left train engaged in an altercation, and armed with pistols); *United Rys. & Electric Co. of Baltimore v. Woodbridge* (Md.), 8 R. R. R. 156, 31 Am. & Eng. R. Cas., N. S., 156 (duty to warn passengers to keep seats where car stopped before reaching transfer point); extensive note appended to *Southern Pac. Co. v. Tarin* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 928.

As to the liability of railroads for injuries to passengers from jerks and jolts of trains or cars, see foot-notes appended to *Reagan v. St. Louis Transit Co.*, 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; foot-notes appended to *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Rutledge v. New Orleans, etc., R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488; foot-notes appended to *Norfolk & A. Terminal Co. v. Morris' Adm'x* (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

†As to whether it is contributory negligence for a passenger to ride on a car platform, see foot-notes appended to *Halverson v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 282, 36 Am. & Eng. R. Cas., N. S., 282; foot-note appended to *Brumncow v. Rhode Island Co.* (R. I.), 12 R. R. R. 512, 35 Am. & Eng. R. Cas., N. S., 512.

‡See foot-note appended to *Dougherty v. Yazoo & M. V. R. Co.* (Miss.), 13 R. R. R. 327, 36 Am. & Eng. R. Cas., N. S., 327.

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it except from her statement, without requiring an explanation of the conflicting statements, was not reversible error.

Medical Testimony.—Where, in a personal injury action, an injury to the nervous system is claimed, it is not error to permit a physician to testify with reference to plaintiff's nervous condition, for he can testify on the subject without relying on what plaintiff says in reference thereto.

Appeal from Appellate Court, First District.

Action by Kate McCaughna against the Chicago City Railway Company. From a judgment of the Appellate Court modifying a judgment for plaintiff, defendant appeals. Affirmed.

This action is brought by appellee against appellant to recover damages for injuries sustained by being thrown from one of appellant's cable trains upon which she was a passenger at the intersection of Wabash avenue and Twenty-Second street, in the city of Chicago, on the 19th day of September, 1901.

The cause of action is set out in the original declaration, consisting of two counts and two additional counts. The first count, after charging that on the 19th of September, 1901, appellant controlled and operated a cable street railroad as a common carrier of passengers for hire in Wabash avenue, in the city of Chicago, alleges, in substance, that appellee became a passenger on a south-bound train toward Twenty-Second street; that she was unable to find a seat in the car on which she was riding, and remained upon the rear platform; that before the train reached Twenty-Second street the conductor told her there was a seat for her upon the grip car, directly in front of the car upon which she was riding, and said to her that she should walk through the car on which she was riding to the front platform, and that she could then step over onto the grip car; that she thereupon walked through the car upon which she was riding to the front platform, and while in the exercise of due care attempted to step from that platform onto the grip car, as requested by the conductor; that the defendant, knowing the premises, or which, by the exercise of diligence, it should have known, ran the car at a great rate of speed, so that, as the train was about to turn from Wabash avenue into Twenty-Second street, and without warning to the appellee, it gave a sudden jerk, and she was thrown.

The second count is substantially the same as the first, except that the negligence therein charged against appellant is that appellee was unable to find a seat, and remained on the front platform; that it was the duty of the appellant to provide her a safe and suitable place on the car on which she was riding; that at the time she was riding upon said car and upon the front platform as a passenger, and in the exercise of due care for her safety, defendant, though knowing the premises, or which by the exercise of reasonable diligence it should have known, but not regarding its duty, carelessly, negligently, and knowingly ran said train at a great rate of speed near and at the intersection of Wabash avenue and Twenty-Second street, and without any

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warning to the plaintiff the train gave a sudden and violent jerk at the place where said cars turn into Twenty-Second street from Wabash avenue, and that she was with great force and violence thrown upon the ground.

The first additional count charges that plaintiff was a passenger for hire upon one of the cars of the defendant on said line, which was attached to and drawn by a grip or motor car southward on said avenue; that the car on which she was riding contained a large number of other persons, and was crowded to such an extent that she was unable to obtain a seat, and that while she was on the rear platform the conductor of the car informed her that she could obtain a seat by passing through the car to the grip or motor in front, and directed her and suggested to her that she walk through the car on which she was riding; that she acted upon such direction and suggestion, and passed forward through said crowded car on which she was riding, in an attempt to reach the grip or motor car; that the servants of defendant carelessly, negligently, and wantonly gave said direction or suggestion to plaintiff while she was a passenger at the time when the car and the train of which it was a part were about to reach Twenty-Second street, at which point the tracks of said line turn eastward from Wabash avenue onto Twenty-Second street; that while she was acting on the suggestion and direction of said servant of defendant, and was pressing forward in said car, and when she had reached the front platform, and was about to pass from it to the grip or motor car, the car and train were suddenly and with great speed turned and jerked on said track about said curve, and through no fault of her own, while in the exercise of all due care for her own safety and while attempting carefully to follow the direction and suggestion of defendant, she was with great force and violence thrown and hurled from said platform of the car upon the ground at the intersection of Wabash avenue and Twenty-Second street.

The second additional count charges that plaintiff was a passenger on said train for a reward; that while it was turning the corner of Wabash avenue and Twenty-Second street, defendant, by its servants, carelessly, negligently, and improperly caused the speed of said train to be suddenly and without warning increased and accelerated and the train to be suddenly jerked, so that by reason of the carelessness, negligence, and improper conduct of the defendant in that regard the plaintiff, while a passenger riding upon the platform of said train, and in the exercise of due care and caution for her own safety, was thrown violently therefrom to and upon the ground.

The injuries alleged to have been sustained by plaintiff are divers internal injuries to the muscles in the lumbar region and severe injuries to her head, back, and nervous system; that her knees, head, legs, and shoulders were sprained, bruised, discolored, and wounded; and that she was otherwise permanently injured.

Defendant pleaded the general issue, and upon a trial before

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a jury a verdict was rendered for the sum of \$3,000, on which verdict judgment was rendered. Upon appeal to the Appellate Court a remittitur was entered of \$1,000, and judgment entered for the sum of \$2,000, and a further appeal is prosecuted to this court.

Wm. J. Haynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

Frank Schoenfeld, for appellee.

RICKS, J. (after stating the facts). But two questions are presented upon this record. The first is upon the refusal of the court to give the peremptory instructions asked by appellant at the close of plaintiff's evidence and at the close of all the evidence. The second is upon the admission of certain evidence. The first question therefore to be considered is whether or not the evidence, from all the inferences that may be drawn therefrom, fairly tends to support plaintiff's cause of action, and not whether plaintiff has proved her cause by a preponderance of the evidence, as is apparently contended for by appellant. If there was evidence fairly tending to support plaintiff's cause of action as laid in the declaration, then there was no error in the refusal of the court to give the instruction.

The accident in question occurred upon what is known as appellant's "Cottage Grove Avenue Line," which is operated by endless cable. The record shows that the train involved in the accident was composed of a grip and two back cars until it reached Eighteenth street, at which point the rear car, or what is known as the "Indiana Avenue Car," was detached from the train, and the grip and one car proceeded on their journey. The evidence for appellee at least fairly tends to show that appellee and her friend, a Mrs. Froelich, took a Cottage Grove avenue car at the corner of Twelfth street and Wabash avenue. The car was going south, and they got on the car next to the grip, on the back platform. The evidence shows that there were two or three other persons standing on the back platform, and people were holding on to the straps inside. Either appellee or her friend paid the fares. They rode upon the back platform for a short time, and appellee said to the conductor, "I wish we could get a seat," and Mrs. Froelich asked the conductor if there were any seats on the grip, and the conductor replied, "Yes ladies, there are." Appellee then said, "When we get to the next stop we will get off and get one." The conductor replied, "You do not need to wait to do that, ladies; you can walk right through the car there." The two ladies then started through the car, Mrs. Froelich being in the lead. When they got to the front platform, Mrs. Froelich crossed over and appellee followed, and about the time appellee was stepping from one car to the other the car was swinging around the corner at Twenty-Second street. Other witnesses confirm the testimony of the above named that the car gave a sudden jerk and appellee was thrown from the car and injured substantially as alleged in the declaration. The

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evidence shows that the conductor knew that the car would swing around this corner, and knew that the car was near the corner when he told appellee to walk through the car. It was therefore his duty to inform her of the danger of the car making the sudden turn, or to have so controlled the car that there would have been no danger in her passing from one car to the other. The night was dark and misty, and, while appellee admits that she knew of the condition of the track at this place, and knew of the turn, yet she was unable to tell, nor did she know, that she was at or near this point.

Nor do we think it was negligence per se for appellee to be or ride on the platform of the street car, as contended by the appellant, and especially under the circumstances under which she came to be upon the platform of the car. Cases cited by the appellant have no application to the case at bar, for the reason they are all upon cases where the parties were riding upon the steps of a steam railroad, and a different rule, therefore, applies, as it is much more hazardous to ride upon the platform of a fast moving train. Besides, the public are not, as a usual thing, invited to ride upon the platform, but, on the other hand, are given warning that they must neither stand nor be upon the platforms of cars while they are in motion. Under the circumstances under which appellee came to be upon the platform of the car, whether or not it was such negligence as would preclude a recovery, and whether appellee, standing upon the platform, was in fact negligent, were questions of fact for the jury to determine from all the facts and circumstances surrounding the transaction. *North Chicago Street Railroad Co. v. Baur*, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108. We are therefore of the opinion that it was not error to refuse the instruction.

As to the first evidence complained of, the following colloquy took place between the court, counsel and a witness: "Q. What did you find on pressure of that nerve, if anything? A. Evidence of pain as complained of by the patient. Judge Page: That is subjective, isn't it? A. Entirely; yes. The Court: Well, am I called upon to rule here? Judge Page: If he doesn't go any further, I don't care. I object to it on the ground that it is subjective, and the doctor says it is. The Court: Well, my ruling will be to overrule your objection." It will be seen that the attorney for appellant remarked, "If he doesn't go any further, I don't care." The record discloses that the examination along this line was discontinued, and we are unable to see how appellant can now urge that the admission of this evidence was error. If it was, in fact, erroneous, counsel, having said that he did not care for what had already been testified to, is in no position to assign an admittance of the same as error. The only other evidence complained of is as follows: "Q. When you say she was nervous, are you telling what she told you, or not? A. No, sir. I know that myself. She is very nervous. Q. Just disregard everything she told you. Tell me anything you saw, if you have personal knowledge yourself upon which to base the statement

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that she is nervous. A. Only just her state of nerves. She seems nervous, and speaks— Q. Only just her statement, did you say? A. Her state of nerves. Q. Do you know anything about it except from her statement? A. No, sir.” While the two answers are somewhat conflicting, and should have been explained, yet we do not think the error was so great as to warrant a reversal of the case, as other competent evidence was admitted showing her nervous condition. Nor do we think the case of *Chicago & Eastern Illinois Railroad Co. v. Donworth*, 203 Ill. 192, 67 N. E. 797, controlling, or even in point, in this case. In that case the witness was testifying as to the hearing of one ear of the defendant, and the court held that, inasmuch as the witness had to take the statement of the defendant in order to determine whether or not he was in fact deaf, it was not competent. In cases of extreme nervousness a physician or other person of ordinary observation can tell by the looks, actions, and manner of speech of a person, and is not compelled to rely upon what such person says in reference to the same in order to form an opinion. The answer of the witness, when interrupted, was proceeding upon a reasonable line of observation.

Finding no reversible error the judgment of the Appellate Court is affirmed.

Judgment affirmed.

RIVERS v. KANSAS CITY, M. & B. R. Co.

(Supreme Court of Mississippi, May 29, 1905.)

[38 So. Rep. 508.]

Carriage of Passenger—Failure to Procure Ticket—Extra Fare.*—

A railroad cannot demand an excess rate of fare of a passenger who boards the train without being provided with a ticket, and such passenger cannot lawfully be ejected from the train for refusing to pay the same, unless he has been afforded reasonable opportunities and facilities to procure a ticket at the regular rate before boarding the train.

Same—Same—Refusal to Pay Extra Fare—Ejection—Question for Jury.—In an action against a railroad for the ejection from a train of a passenger who was not provided with a ticket and who refused to pay an excess fare, whether plaintiff had had a reasonable opportunity to purchase a ticket before boarding the train, and whether it was his fault, or that of the railroad's agents, that he failed to procure one, held, under the evidence, a question for the jury.

Appeal from Circuit Court, Marshall County; J. B. Booth, Judge.

Action by L. N. Rivers against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

*See foot-note appended to *Kennedy v. Birmingham Ry., etc., Co.* (Ala.), 9 R. R. R. 700, 32 Am. & Eng. R. Cas., N. S., 700; foot-note appended to *Monnier v. New York Cent. & H. R. R. Co.* (N. Y.), 8 R. R. R. 187, 31 Am. & Eng. R. Cas., N. S., 187.

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Smith & Robertson and *W. A. Belk*, for appellant.
J. W. Buchannan, for appellee.

Cox, Special Judge. Appellant, who was plaintiff below, got upon one of the defendant's passenger trains at Potts Camp, a station upon defendant's road, to go to Holly Springs. Shortly after the train had left Potts Camp, the conductor asked for his fare; not having a ticket, he tendered the regular fare of three cents per mile. This was declined, and the conductor, acting under a rule of the company, demanded four cents per mile. This was unlawful, and the rule, therefore, cannot be sustained in this case, unless appellee had afforded appellant reasonable opportunity and facilities to procure a ticket at the lower rate, and thereby avoid the disadvantage of such discrimination. If appellant endeavored to buy a ticket before he entered the car, and was unable to do so on account of the fault of appellee, its agents or servants, and offered to pay the ticket rate on the train, he had the right to be carried for the regular fare. He explained to the conductor that he had not been able to purchase a ticket, and insisted on his right to be carried at the ticket rate. This demand was ignored, and he was ejected from the train.

This action of the conductor was unlawful, and appellee is liable therefor in damages, if appellant had endeavored, before he entered the car, to buy a ticket, and was unable to do so on account of the fault of appellee, its agents or servants. *Forsee v. Ala. G. S. R. R. Co.*, 63 Miss. 66, 56 Am. Rep. 801.

Upon the trial of the case, plaintiff testified upon this point that he went to the depot, and went into the ticket office and knocked on the window, knocked on the door, and holloaed, "Give me a ticket;" that he stayed in the depot room some two or three minutes, and when he came out the train was in sight, and was nearly a half mile—more than a quarter mile—off; that it was fully five minutes after he got into the ticket office before the train came into the yards; that the window to the ticket agent's office was down; that he kicked and knocked on the door and nobody responded, and that he failed to get a ticket. Sam Taylor, witness for plaintiff, testified that on the morning in question he was at the depot when plaintiff came, and that plaintiff was at the station five to seven minutes before the arrival of the train, and had plenty of time to get a ticket, and that he went in and asked for a ticket five to seven minutes before the arrival of the train. Charles Stephens, witness for defendant, testified that he recollected Mr. Rivers (plaintiff) coming over to the depot on the morning in question and asking for a ticket; that this was at 8:15, which was about the regular schedule time for the train. Other witnesses say the train was 20 to 27 minutes late that morning, and this is not disputed. J. W. Gaulding, appellee's agent at Potts Camp, testified on behalf of defendant that he kept the ticket office open that morning for an hour and five minutes; that he closed up at 8 o'clock and went after the United States mail, was gone about three or four minutes and came back, and was not gone any other time; that he

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remained in the office until the train came, which was 27 minutes late, when he went out to the train to put on the mail and express and take off any baggage, and to attend to other duties of like character, and that he did not see plaintiff. B. E. Lowrey, for appellee, testified that he went with plaintiff to the depot that morning, and that, when they got to the steps there, the train had run up to the station, and the agent was going out down the platform towards the train. M. N. Miller testified that Rivers ran into the office just about the time the train stopped, and called for a ticket at the ticket window, and that Gaulding, the agent, had then gone out to the baggage car. C. H. Reid testified, for appellee, that the train was making its way in as plaintiff came over to the depot, and that Gaulding, the agent, went out to meet the train as soon as the engine ran into the station. Charles Stephens testified that, when Rivers knocked at the window and called for a ticket, Gaulding, the agent, was up attending to the mail and baggage. This was substantially the testimony touching the opportunity afforded plaintiff to get a ticket, and the effort made by him to get one. The court ordered a verdict for defendant, which is assigned for error.

The instruction should not have been given, but the jury should have been permitted to say, under proper instructions, whether plaintiff had been offered reasonable opportunity and facilities for getting a ticket, and whether it was through his fault or that of the defendant, its agents or servants, that he failed to procure one. The facts as to the time when plaintiff reached the ticket office, and as to the whereabouts of the train at that time, are in dispute, and the inferences to be drawn from these disputed facts are doubtful. The doubt should be resolved by the jury.

Reversed and remanded.

SOUTHERN LIGHT & TRACTION CO. v. COMPTON.

(Supreme Court of Mississippi, June 12, 1905.)

[38 So. Rep. 629.]

Separation of White and Colored Passengers—Evasion of Statute.*

—Signs 8 by 12 inches in size, having painted thereon the words "White" and "Colored," respectively, and supported on the backs of seats in street cars, are not "adjustable screens" within the meaning of Laws 1904, p. 140, c. 99, requiring the separation of the white and colored races on street cars, but permitting the use for that purpose of adjustable screens, to be moved about as the needs of the traffic may require.

Same—Same—Same—Ejection of Passenger — Justification. — A street railway company which evades Laws 1904, c. 99, p. 140, requiring the separation of the white and colored races on street cars, by

*For the authorities in this series on the subject of the duty to furnish separate cars for white and colored passengers, see foot-note appended to *Louisville & N. R. Co. v. Com.* (Ky.), 10 R. R. R. 262, 33 Am. & Eng. R. Cas., N. S., 262.

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merely posting small signs to mark the limits of the space allotted to the respective races, cannot invoke the provision of the law authorizing the conductor to move the partition or screen separating the races according to the needs of the traffic, and to put all passengers who refuse to accommodate themselves to such adjustment off the cars as a justification for his act in ejecting a passenger.

Ejection of Passenger—Punitive Damages.†—Punitive damages may be awarded to a female passenger who was rudely ejected from a street car by the conductor, and compelled to walk some distance in the mud, because of her refusal to comply with an unwarranted demand of the conductor that she change her seat in the car.

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by Charlie Compton against the Southern Light & Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the trial the evidence for the plaintiff was to the effect that appellant was operating a street car system in the city of Natchez, and on or about August 26, 1904, plaintiff and three lady friends boarded one of its street cars and rode out to a park, where the street car was reversed and preparations made to return. The conductor placed two signs, about 8 by 12 inches, supported by two pegs on the back of seats, having painted on one side the word "White" and on the other "Colored," about the middle of the car, and they remained there for some time until the part for the colored people began to fill up, and some of them were standing. There were no passengers in the white compartment except plaintiff and her companions. The conductor approached plaintiff, who was sitting on the first seat in the white compartment next to the sign, and asked her to move forward, so he could move the sign up to let the colored people have more room. Plaintiff declined to move, when the conductor in a rough tone demanded that she move forward, and seized her by the arm, and again demanded that she move forward, and told her that she must move or get off the car, and rang the bell for the car to stop, when plaintiff and her companions got off the car, and had to walk some distance in the mud.

Ratcliff & Clinton, for appellant.

Brown & Martin, for appellee.

WHITFIELD, C. J. The use of a sign, such as the one shown by the testimony in this case, is not a compliance with, but an evasion of, the act of 1904. Laws, p. 140, c. 99. The dominant and controlling purpose of this statute—one most unfortunately

†As to the right to recover punitive or exemplary damages for injuries to passengers, see foot-notes appended to *Pickett v. Southern Ry. Co. (S. Car.)*, 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly (Miss.)*, 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48; foot-notes appended to *Northern Cent. Ry. Co. v. Newman (Md.)*, 10 R. R. R. 525, 33 Am. & Eng. R. Cas., N. S., 525.

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framed—was to secure a real separation of the white and colored races on street cars. This was a wise purpose, and the court must effectuate that purpose. The object of the law was to prevent race conflicts, which would be inevitable under the enforcement of this statute, in accordance with the view that this sort of a sign is a screen. The same object is accomplished as to railroads by section 3562, Code 1892. What was meant to be done in the case of street railroads was to so completely and effectually separate or screen passengers of one race from passengers of the other, on street cars, that there would be no association in any way of one race with the other. And yet, with this being the clear purpose of the statute—the wise and wholesome intention of the law makers—we find a lot of unfortunate minor provisions in the statutes calculated to overthrow the main purpose of the law. The provision that the conductor may have an adjustable screen, and may move that adjustable screen about as the needs of the traffic require, is a provision so manifestly unwise, and so clearly subversive of the dominant feature of the statute, as to make it a matter of wonder that this result should have escaped the attention of the lawmakers. The learned counsel for appellant puts this case: Suppose, say they, the cars started with two passengers, one white and one black, the white one in the white compartment, and the black one in the black compartment, and that the law means that the screen, once fixed, is not to be again moved. Then suppose that after traveling some distance the black compartment fills completely up, and becomes filled besides with negroes standing. There could be no moving of the screen so as to seat the standing negroes, although there should be but the one white person in the white compartment. And this is a perfectly just illustration to show that the construction of the statute, on this minor feature, contended for by counsel for appellee, is not admissible within the literal letter of the act. But it also shows clearly the unwisdom of having such a provision in the statute at all. The opposite case might just as well occur—of the white compartment filling to overflowing with white passengers standing, with only one negro in the colored compartment. But take another view of the practical operation of the statute as written. Suppose the conductor, when the car started, had what he had here, a couple of white ladies occupying a seat in the white compartment next to the sign supposed to separate them from the colored compartment, and suppose that in the conductor's best judgment the sign should be stuck up so as to leave but two rows of seats for colored persons, and all the rest for whites. Then, according to the letter of the statute, insisted upon by counsel for appellant, the conductor could move these ladies, accordingly as the number of colored passengers increased, if no other white persons got on, from seat to seat forward, advancing the sign each time, as many times as there would be seats unoccupied in the white compartment. It is possible that the Legislature meant to authorize a conductor thus to move passengers who had paid their fare, and taken proper seats

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—seats, too, assigned to them by the conductor—and to eject them from one seat, and put them into another, it may be as many as a dozen times, because the needs of the traffic required it? And yet this act is written just that way, and there is no interpretation that can be put upon it—that is to say, this particular feature of it—other than the one which the learned counsel for appellant press upon us, without making a law instead of interpreting it. From which it follows inevitably that if this, the minor, feature of the statute, was all there was for our consideration in this case, this judgment would necessarily have to be reversed, because the statute expressly authorizes—nay, requires—the conductor to move the partition or screen about according to the needs of the traffic, and to put all passengers who refuse to conform to his demands off the cars. We have thus commented upon the features of the statute indicated in order to show the necessity which exists that the Legislature should promptly repeal this exceedingly unfortunate statute, and provide a statute for street cars similar to section 3562 of the Code. But that which saves the case plainly and clearly is that the appellant has not at all complied with the main provision of the statute and the controlling purpose of the act. It has not provided any separate cars for the two races, or any separate compartments for the two races, or any adjustable, movable partitions or screens to separate the two races. The little piece of board, called a sign, stuck up on the back of a seat, with the words painted on it, is no partition or screen within the meaning of this law. The very words “partition” or “screens” *ex vi termini* import complete separation between the races in street cars, so that passengers in one compartment shall be shut out from passengers in the other. The object of the law was absolute, complete, and perfect separation, so that there should occur none of the outbreaks and conflicts marring the public peace, and ending, it may be, in bloodshed. Nothing but constant friction could possibly arise from the use of a mere little sign, exasperatingly shifted about from point to point, requiring passengers to change their seats, already assigned, whenever a conductor “drest with a little brief authority” chose. Such the evidence shows was the sign used in this case. It separated nothing; it screened nothing; it partitioned nothing. The word “screen,” as well as the word “partition,” imports that one race is to be shut out from any sort of contact with the other. Everybody knows what a screen or partition is, and everybody knows that a sign such as was used in this case is no partition or screen whatever within the meaning and purpose of this law. It ought to be the study of corporations operating street car lines within communities wherein dwell two distinct races so to operate them as to secure to the utmost harmony and peaceful relations between them in public travel. That was the object the Legislature had in view in the enactment of this law. That is what the terms “separate cars,” “compartments,” “partitions,” and “screens” intended to secure. The statute has used no such word as “sign,” and it is asking far too much of a court to find in a little

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piece of painted plank, separating nothing, the partition or screen which the law has demanded shall be used.

In view of the fact, therefore, that the appellant has itself violated the law in not having such a partition or screen as the law requires to secure the separation of the races, the appellant is in no position to insist upon an observance of the minor features of the statute. We cannot thus "tithe the mint, the anise, and the cummin, and neglect the weightier matters, of the law." He who disregards plainly the great and dominant feature of the statute is in no position to assign errors growing out of a supposed disregard of minor features of that statute. There was evidence warranting punitive damages, if believed by the jury. For this reason we think the right result has been reached in this case, and the judgment is affirmed.

CHICAGO UNION TRACTION CO. v. NEWMILLER.

(Supreme Court of Illinois, April 17, 1905.)

[74 N. E. Rep. 410.]

Appeal—Review.—In an action for injuries the judgment of the Appellate Court is conclusive on the question as to whether the verdict is supported by the weight of the evidence.

Injury to Passenger—Explosion—Panic—Prima Facie Case.*—Plaintiff, while a passenger in defendant's street car, was startled by an explosion in the controller, which caused a panic. When the explosion occurred, the passengers, including plaintiff, rushed from the rear door, and plaintiff was pushed and fell to the pavement, sustaining serious injuries. Held, that the circumstances of the accident were sufficient prima facie evidence of negligence on the part of the carrier under the doctrine of *res ipsa loquitur*.

Appeal—Review.—An objection on the ground of variance between the issues and proof cannot be reviewed where the question was not raised in the trial court.

Injury to Passenger—Explosion—Panic—Sufficiency of Declaration.—Where, in an action for injuries to a passenger, the declaration averred that the injury was the result of an explosion in the electric equipment of the street car; that such explosion created a panic among the passengers, causing plaintiff and the other passengers to rush to the rear door, and in the excitement plaintiff was pushed from the car to the pavement and received the injury—it was not objectionable after verdict, on the ground that it did not allege that plaintiff was injured by the explosion, or in endeavoring to escape from danger apprehended by her therefrom.

Same—Same—Same—Contributory Negligence—Loss of Presence of Mind.†—Where plaintiff and other passengers on a street car were

*See foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; foot-note appended to *Jones v. United Rys. & Elec. Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631; foot-note appended to *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292.

†See foot-notes appended to *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

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thrown into a panic by an explosion in the controller box, and plaintiff was injured in attempting to escape from the car, an instruction that if a person, without fault on her part, is confronted with apparent sudden danger, the obligation resting on her to exercise ordinary care for her safety does not require her to act with the same deliberation and foresight which may be required under ordinary circumstances, was properly given.

Instructions.—Where the court charged that plaintiff was required to prove that she was pushed or thrown from defendant's car and injured, as alleged, or she could not recover, it was not error to refuse to charge that plaintiff could not recover unless the jury believed from a preponderance of the evidence that plaintiff was in fact pushed and thrown from the car to the street, as charged in the declaration.

Appeal from Appellate Court, First District.

Action by Inga Newmiller against the Chicago Union Traction Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

This is an action on the case, brought by Inga Newmiller against the Chicago Union Traction Company, to recover damages for personal injuries alleged to have been sustained by her while a passenger upon one of its cars. The original declaration alleges that on April 29, 1902, the defendant received the plaintiff on one of its east-bound electric Lake street cars as a passenger, and that, while she was in the exercise of ordinary care for her own safety, a fuse exploded, causing a loud report and a large amount of flame and smoke on said car, caused by the recklessness and negligence of the defendant, which explosion, flame, and smoke produced a panic among the passengers, by reason of which they made a rush for the rear door and platform, whereby the plaintiff was pushed and thrown from the car and was injured. An additional count alleged that while the plaintiff was a passenger on said car, and was exercising ordinary care for her own safety, an explosion occurred, caused by the negligence of the defendant, thereby causing a loud report and a large amount of flame and smoke in said car, which explosion, flame, and smoke produced a panic among the passengers, by reason of which they made a rush for the rear door and platform, whereby the plaintiff was pushed and thrown from the car and injured. The defendant filed a plea of not guilty, and the trial was by jury.

The accident on account of which this suit was brought occurred April 29, 1902, about 1 o'clock in the afternoon. The car in question was a Lake street electric car east-bound, and the accident occurred while the car was crossing Garfield Park. It was a long, closed car, with seats running lengthwise, and the plaintiff, a young woman about 25 years of age, sat at the extreme rear end on the left-hand side. There were 20 to 35 other passengers in the car. The controller was located on the front platform, close to the dashboard. While running at the rate of six or seven miles an hour there was a sudden flash and noise from the controller, and flames shot out of it to a height of five or six feet. The noise of the explosion was compared by one

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witness to the report of a shotgun, and by another to the explosion of a firecracker. The passengers rushed out of the car onto the rear platform, and the plaintiff, who was also endeavoring to get out, was pushed off and fell to the pavement. Her injuries consisted of two broken ribs and other injuries which confined her to her bed for about a month. She also claimed that the accident caused her a severe nervous shock, which has resulted in epileptic fits. Upon a hearing judgment was rendered in her favor for \$4,500, which has been affirmed by the Appellate Court, and a further appeal has been prosecuted to this court.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant.

John F. Waters and C. H. Johnson, for appellee.

WILKIN, J. (after stating the facts). It is insisted by appellant, as grounds of reversal, that the evidence is wholly insufficient to support the verdict, that the declaration is insufficient, that there is a variance between the allegations of the declaration and the proof, that the doctrine of sudden peril was improperly applied in the trial of the case, and that the court erred in giving and refusing instructions.

As has been held in many cases, we have nothing to do with the controverted facts of the case, or whether the verdict is supported by the weight of the evidence. The judgment of the Appellate Court is conclusive of these questions.

At the close of all evidence there was a written motion by appellant to exclude the evidence from the jury, and to instruct the jury to find for the defendant, which was overruled by the court. On what particular grounds the motion was urged does not appear from the abstract, but in its consideration we are limited to the one question whether there was evidence fairly tending to support the verdict. It is not denied that appellant was rightfully a passenger on the defendant's car. As shown by the foregoing statement, she occupied a seat at the extreme rear on the left-hand side, and there can be no pretense that she was not in the exercise of due care for her own safety at the time of the explosion. While in this position the explosion occurred in the controller on the front end of the car. The controller was a part of the machinery used in operating the car, and it was in the possession and under the control of the appellant. It is clear that the explosion and flames caused a panic among the passengers, which resulted in the injury. All of these facts are clearly proven by the evidence. As to the explosion being the result of the negligence of appellant, while, as a general rule, negligence is not to be presumed, there are well-understood cases where the circumstances of the accident afford sufficient prima facie evidence of negligence. We think the case at bar falls fairly within the maxim *res ipsa loquitur*. Where an injury occurs to a person who is a passenger in the exercise of ordinary care, upon the car of a common carrier, by some defect in the machinery wholly under the control of the carrier, a prima facie case of negligence

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on the part of the carrier is established, and the burden of proof is upon it to show that the accident was without its fault. *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; *Chicago City Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478; *New York, Chicago & St. Louis Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809; *Toledo, Wabash & Western Railway Co. v. Moore*, 77 Ill. 217; *Illinois Central Railroad Co. v. Phillips*, 49 Ill. 234; *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 890; *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468. The facts proved made a prima facie case of negligence against the appellant, and were clearly sufficient to support the verdict, and therefore justified the court in overruling the motion to take the case from the jury. The question as to whether this prima facie case was rebutted by the appellant's evidence was one for the jury. If there was a material variance between the declaration and the evidence (which we are unable to discover), it was the duty of the appellant to call the attention of the court to it, either by objections to the evidence or a motion to exclude the same when the variance became apparent, or in some other way. Such an objection, when raised as a question of law in this court, must have been presented to the trial court, and a ruling upon it which this court can review. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015; *Chicago & Northwestern Railway Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117. We find nothing in the abstract of the record showing that the question was presented to the trial court. If it had been, the variance could doubtless have been removed by the introduction of other testimony or an amendment of the declaration.

It is again insisted that the declaration is defective in that it does not allege that appellee was injured by the explosion, or in endeavoring to escape from danger apprehended by her from the explosion, but that she was injured by the passengers in rushing out of the car, there being no negligence shown or alleged against appellant in receiving the other passengers or in failing to restrain them; also, that the evidence shows that appellee jumped or fell from the car, and that she was not pushed or thrown therefrom. We do not consider either contention tenable. The declaration avers that the injury was the result of the explosion; that it created a panic among the passengers, causing them to rush to the rear door, appellee among them, and in the excitement she was pushed from the car onto the pavement and received the injury. These allegations were clearly sufficient to sustain the plaintiff's action, especially after plea and verdict, and, as we have seen, the evidence fairly tends to sustain the declaration.

Complaint is further made of the giving of the first instruction on behalf of appellee, as follows: "The court instructs the jury that if a person, without fault on her part, is confronted

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with sudden danger or apparent sudden danger, the obligation resting upon her to exercise ordinary care for her own safety does not require her to act with the same deliberation and foresight which might be required under ordinary circumstances." It is said the instruction states an abstract proposition of law, and that it omits the qualification that the danger must have been such as to be apparent to a person of reasonable prudence. There was certainly sufficient evidence upon which to base it, and thus remove the objection that it was a mere abstract proposition of law not applicable to the facts of the case; and it is also apparent, from the evidence as to the action of the other passengers at the time, that there was sudden and apparent danger of fire to a person of ordinary prudence. There was no error in giving the first instruction.

The fourth instruction given on behalf of appellee is also urged as error. It is as follows: "The court instructs the jury that if you believe and find from the evidence that the plaintiff was a passenger on one of defendant's cars, and while such passenger she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a prima facie case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance, and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road." It is insisted that this instruction is fatally defective, in that it fails to inform the jury that, in order to entitle plaintiff to recover, she must have shown not only that an explosion occurred, but that such explosion was caused by some negligence on the part of the defendant. In accordance with the authorities already cited, the explosion of a part of the machinery under the control of appellant, injuring appellee in the exercise of reasonable care for her own safety, was prima facie evidence of negligence on the part of appellant. What has been said with reference to the evidence of negligence on the part of the defendant, and the decisions cited, are equally applicable here. We are of the opinion that the instruction announced correct rules of law applicable to the case, and is not defective in the particular pointed out by counsel for appellant.

Nor do we think it was error to refuse the fifth instruction asked on behalf of appellant. It was as follows: "The court instructs the jury that, under the allegations contained in the declaration in this case, they cannot find the defendant guilty unless they believe, from a preponderance of the evidence in the case, that the plaintiff was in fact pushed and thrown from said car to and upon the street in manner and form as charged in the declaration." The ground upon which it is insisted it should have been given is that there was evidence tending to show that

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appellee fell or jumped from the car. The sixth instruction given at the request of the appellant told the jury that the allegation that the appellee was pushed and thrown from the car and injured was a material allegation of plaintiff's declaration, and that she must prove said allegation by a preponderance of the evidence, or she could not recover. To the same effect was the thirteenth instruction given on behalf of the appellant. These instructions contained the same point sought to be presented by the fifth. The court was not called upon to repeat its instructions to the jury. On the contrary, it was its duty to avoid doing so.

We have given this record such consideration as the importance of the case demands, and are of the opinion no reversible error has intervened.

Judgment affirmed.

WILLIAMS v. SPOKANE FALLS & N. RY. CO.

(Supreme Court of Washington, May 22, 1905.)

[80 Pac. Rep. 1100.]

Injury to Passenger—Prima Facie Case.*—Evidence that the injury of a passenger was connected with the operation of the railroad makes out a prima facie case of negligence, devolving on the carrier the duty of overcoming this.

Same—Negligence—Sufficiency of Evidence—Defective Coupler.—Where, in making up a passenger train, the coupler connecting the baggage car with the tender gave way, causing injury to a passenger, negligence of the carrier is proven by evidence that the coupler had come apart several times before, that the carrier's servants knew it was liable to come apart, and that, notwithstanding this, they threw off the safety chains simply to expedite business.

Counsel Reading Law.—Allowing counsel to read from lawbooks in the presence of the jury, in his argument, is not ground for reversal, unless injury be shown.

Carriage of Passengers—Degree of Care.†—An instruction in an action for injury to a passenger that it was the carrier's duty to carry plaintiff safely, so far as human care and skill would enable it to be done, does not place too high a duty on the carrier.

Injury to Passengers—Defenses—Customs of Other Carriers.—It is

*See foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; foot-note appended to *Jones v. United Rys. & Elec. Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631; foot-note appended to *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292.

†As to the degree of care due from a carrier of passengers, see foot-notes appended to *Hart v. Seattle, etc., Ry. Co.* (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; foot-notes appended to *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248.

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no defense to an action for injury to a passenger that the carrier did as other carriers have customarily done.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by Herbert L. Williams against the Spokane Falls & Northern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

M. J. Gordon and C. A. Murray, for appellant.

Graves & Graves, for respondent.

DUNBAR, J. Respondent was a railway postal clerk in the service of the United States. On August 15, 1903, he was one of the clerks in charge of a postal car attached to a train of the appellant running between Spokane and Northport. The car on which he was occupied was, pursuant to the usual custom, detached from the train at the latter point, and set in on a side track, to be returned to Spokane on the day following. Northport is a terminal point, and trains are made up at that point for other destinations. The siding upon which this postal car was placed was 300 feet in length, and an even grade. A switch engine engaged in making up a passenger train entered upon this track with a baggage car and two coaches. For some cause, unknown and unexplained by the testimony, the coupler which connected the baggage car with the tender of the locomotive parted, and the three cars ran along the siding and collided with the postal car which contained the respondent, injuring him most seriously. This action was brought to recover damages for the injuries so sustained, and resulted in a verdict in respondent's favor. Motion for new trial was duly entered and overruled, and judgment rendered upon the verdict, from which judgment this appeal is taken.

It is conceded that the respondent was performing his duty on the car, and it is also conceded that the rules of law applying to passengers on a railroad car apply to him. At the conclusion of the testimony for both respondent and appellant, the appellant requested the court to charge the jury to find for the defendant. This request was overruled, and upon the action of the court in this respect is based the first assignment of error, the contention being that there was no proof that there was any negligence on the part of the appellant; that there is no allegation that there was any defect in the construction of the cars or in their equipment, or that they were in a defective or unsafe condition, in any respect, at the time of the happening of the accident; and that no legal presumption of negligence arose, casting upon appellant the burden of disproving it. The particular negligence alleged is that, while respondent was in the discharge of his duties in a postal car on a siding at Northport, the appellant's servants and employees negligently ran and propelled against said mail car other cars, by means of a locomotive operated by it, and said mail car was struck by said cars, propelled with great

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force and violence, pushing it for a distance along and derailing it, thereby throwing respondent down. The answer denied any negligence, and it is contended that there was no negligence shown. *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, and *Allen v. N. P. Ry. Co. (Wash.)* 77 Pac. 204, 66 L. R. A. 804, are relied upon to sustain the appellant's contention. In *Hawkins v. Cable Ry. Co.*, supra, this court held that the following instruction, "It is the law that, where a passenger being carried on a train is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it," constituted reversible error, as being too broad a statement of the responsibility of the carrier. There, it will be observed, the instruction overruled had no limitations whatever; and, under that instruction, if the passenger had been injured by some unavoidable accident, disconnected entirely from the railroad company, such as an injury resulting from the discharge of a firearm by some one in the car, or through the window by some one outside of the car, the company would have been held responsible. So that it is not enough that the passenger is injured without fault of his own, but the injury must be connected in some way with the operation of the road; and, when the injury is so connected, we think, under the overwhelming weight of authority, that a prima facie case of negligence is made out by the plaintiff, and that the duty devolves upon the company to establish a want of negligence on its part. And the cases cited by this court in that case show that such was the view that the court took of the law. There is nothing in the case of *Allen v. N. P. Ry. Co.*, supra, to sustain appellant's contention. Mr. Thompson, in his *Commentaries on the Law of Negligence*, vol. 3, § 2754, very happily expresses the distinction which we have sought to make. The section is as follows: "In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof in the first instance is, of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim *res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him to the satisfaction of the jury, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a prima facie case for damages against the carrier

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by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage." And in section 2756, showing that the presumption arises not from the happening of the accident, but from a consideration of the cause of the accident, it is further said: "It has been pointed out by an able judge that the presumption which arises in these cases does not arise from the mere fact of the injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.'" And a wilderness of cases is cited to sustain the announcement of the text. The cases on this subject are collated in the Century Digest, vol. 9, commencing on page 1235, and the doctrine is almost universally announced that the fact that an injury results from a railroad collision without any fault of the passenger is *prima facie* evidence of carelessness, negligence, or want of skill on the part of the company, and the burden is upon it to prove that the accident was not occasioned by the fault of its agents. *Goble v. Delaware, L. & W. R. Co.*, Fed. Cas. No. 5,488a; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *New Orleans, J & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Chicago City Ry. Co. v. Engel*, 35 Ill. App. 490; *Central Pass. Ry. Co. v. Bishop*, 9 Ky. Law Rep. 348; *N. C. St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899—and many other cases too numerous to cite, the circumstances of which are parallel in principle with the circumstances in this case, support the law announced. This is also in accordance with a decision made by this court in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, where it was said: "Whenever a car or train leaves the track, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated." And this is the just and equitable rule, for the cause of the accident is within the knowledge of the railroad company, while it might be a difficult matter for the plaintiff to prove what the cause of the accident was. So far as the proof was concerned, we think, also, that there was ample proof to show negligence on the part of the appellant. There was testimony to the effect that this coupling had come apart several times before, and that it was within the knowledge of the appellant's servants that it was liable to come apart; and, having that knowledge, it had no right to throw off the safety chains simply for the purpose of expediting its business, to the extent of imperiling the life of the respondent. This manner of switching

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could only be safely done and relied upon on the supposition that that coupling could be absolutely depended upon, and the removal of the safety appliance under such circumstances constituted negligence on the part of the company towards its passengers. We think the court committed no error in overruling the appellant's motion for an instruction to find a verdict for the defendant.

In consideration of the fact that the amount of the judgment is not called in question, the second, third, and fourth assignments of error are immaterial.

The contention that the court erred in permitting respondent's counsel to read from lawbooks in the presence of the jury in the course of his argument was decided adversely to such contention in *Gallagher v. Town of Buckley*, 31 Wash. 380, 72 Pac. 79.

Among others, the court gave the following instruction: "Under the allegations of the complaint and the admissions of the answer, plaintiff, when upon a mail car of the defendant as a postal clerk in the employ of the United States, and in the discharge of such duties as such clerk, was a passenger, and entitled to the care and caution to preserve him from injury that defendant, under the law, owes to a passenger. That duty was to carry the plaintiff safely, so far as human care and skill would enable it to be done. Out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to its hands, the law requires the carrier to exercise the highest degree of care, prudence, and caution in running and operating its cars, so as to prevent injury to its passengers. It is not sufficient that the carrier has employed the same character of appliances, has exercised the same degree of care in their inspection, has taken the usual and ordinary precautions to avoid accidents, and that its trains were operated in the same manner as is customarily and ordinarily done by other carriers under like circumstances. The carrier is bound to use such quality of appliances, and to exercise such care in the use of those appliances, as human foresight would suggest as a measure to protect the passengers from harm; and the carrier cannot exonerate itself from exercising this ordinary vigilance for the safety of its passengers, which the law required, by showing that other carriers have customarily and ordinarily done the same thing, unless the jury find from the evidence that this manner of doing the things was such as the highest degree of care, prudence, and caution required, so as to prevent injury to passengers." It is contended by the appellant that the first part of the instruction, viz., that it is the defendant's duty to carry the plaintiff safely, so far as human care and skill would enable it to be done, is opposed to the doctrine laid down by this court in *Johnson v. Seattle Electric Co.*, 35 Wash. 382, 77 Pac. 677, where it was held that an instruction to the effect that a corporation engaged in the transportation of passengers is held by the law to the exercise of the highest degree of care in the

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equipment of its road and the manner of its operation, and that a transportation company is not an insurer of the lives or limbs of its passengers, but the law calls upon it to do whatever can be done to insure their protection while they are being transported, stated the law too broadly; this court saying that there are many things that a carrier could do which would conduce to the safety of its passengers, which it is not required to do, simply because the practical prosecution of its business will not permit of it. It was, however, evidently not the intention of the court in that case to overrule the law announced in the previous case of *N. P. R. Co. v. Hess*, 2 Wash. St. 383, 26 Pac. 866, where it was said: "Public policy and safety require that they [the carriers] be held to the greatest care and diligence, in order that the personal safety of passengers be not left to chance or the negligence of careless agents; that, although the carrier does not warrant the safety of passengers against all events, yet his undertaking and liability as to them go to the extent that he, or his agents where he acts by agents, shall, so far as human care and foresight go, transport them safely, and observe the utmost caution characteristic of careful, prudent men;" and in *Clukey v. Seattle Electric Co.*, 27 Wash. 70, 67 Pac. 379, where the court sustained the following instruction: "Common carriers, in the operation and running of their cars, and especially common carriers, such as this, owe the duty to passengers whom they carry to use the highest degree of skill, care, and prudence in the running and in the operating of those cars, so as to prevent injuries to those passengers." For these cases were discriminated in the *Johnson Case*; the court holding that the expression that "the law calls upon it to do whatever can be done to insure their protection" was stronger than the expression used in the former cases. The case of *Cogswell v. West Street & North End Elec. Ry. Co.*, 5 Wash. 46, 31 Pac. 411, was not called to the attention of the court in the *Johnson Case*; that case having decided that it was the duty of the company to exercise the highest degree of care in the transportation of passengers; the court saying: "It has long been the rule that, when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence;" citing *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019; and *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141. Neither was there cited to the court the case of *Sears v. Seattle Electric Street Ry. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, or the court might have thought itself justified in holding that the words "but the law calls upon it to do whatever can be done" meant only whatever could be done in the prudent operation of the road. In the *Sears Case* it is said: "It is contended that the court erred in charging the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers. And it is claimed

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by the appellant that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. But we do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence, and caution. The highest degree of care, prudence, and caution in running and operating street cars so as to prevent injury to passengers cannot be said to mean such a degree of care as will absolutely prevent injury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business." The court, in the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, cited by this court in *Cogswell v. West Street, etc., Co.*, supra, in commenting on this question, says: "The court only applied to a new state of facts principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502, it was said that, when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. This doctrine was expressly affirmed in *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, and *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, and in *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877." In fact, this is almost the universal authority. The expressions used by the court—as far as human care and foresight can go, he must exercise the greatest possible care and diligence, extraordinary vigilance aided by the highest skill, greatest degree of care, skill and foresight, utmost skill and foresight, extraordinary diligence and foresight, utmost care and diligence in order to prevent injuries which human care and foresight can guard against—and words of similar import, all of them mean, in effect, the same as the language employed by the court in this case, viz., that the duty was to carry the plaintiff safely, so far as human care and skill would enable it to be done. If it is the duty of the carrier to exercise the highest degree of care and skill, it follows that the latter part of the instruction complained of is correct, for the highest degree of care and skill is the highest degree of care and skill which the circumstances surrounding the operation of the

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business will warrant, regardless of the amount of care and skill that is exercised by other carriers. And the carrier cannot escape the responsibilities for the violation of a duty which the law imposes upon him by pleading the violation of that duty by other carriers. If the custom of railroad companies was to be accepted as the measure of care, then there would be no stimulus to improve; each carrier relying, not upon its own exertions to exercise extraordinary care, but upon the custom of other carriers. In *Union Pac. R. Co. v. Hand*, 7 Kan. 380, it is pertinently said by the court: "At the request of the plaintiff below, the court instructed the jury that, 'if the defendant could have prevented the accident by the utmost human sagacity or foresight with respect to their track, then the defendant is liable.' This is established law. The defendant sought to have it explained to the jury by requesting the court to tell them 'that the utmost human sagacity required of the defendant did not require of the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the constructing, operating, or maintaining of railroads.' This the court refused to give, and its refusal is assigned as error, and we are asked to correct it. We know of no reason peculiar to this state why human life and safety are not as valuable here as elsewhere. At any rate, it is not the province of courts to cheapen it by construing away established principles laid down to make life secure." The same principle was announced in *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725.

Error is based upon the refusal of the court to give several instructions asked by the appellant, but the most of them are erroneous if the instructions which the court gave are correct, and inasmuch as the court gave the following instruction: "The plaintiff brings this action against defendant to recover damages for injuries which he claims he sustained by reason of the negligence of the defendant. The burden of proving negligence rests on the party alleging it, and, where a party alleges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence, as verdicts must stand upon evidence, and are not permitted to rest upon mere conjecture, however plausible. There is no presumption that because the plaintiff was injured the defendant was negligent. Therefore, in this case, if the jury finds that the weight of evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and your verdict should be for the defendant"—it was not necessary to give the instructions asked for by the appellant, to place all the questions of law involved in the case fairly before the jury.

No error appearing in any respect, the judgment is affirmed.

MOUNT, C. J., and FULLERTON and HADLEY, JJ., concur.

CHICAGO, B. & Q. R. Co. *v.* POWERS.

(Supreme Court of Nebraska, May 17, 1905.)

[103 N. E. Rep. 678.]

Carriage of Freight—Beginning of Liability.*—When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier at once attaches.

Same—Same.*—Such liability does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier.

Live Stock—Conditional Delivery to Carrier—Liability.—A railroad company, which constructs yards by the side of its track to facilitate the loading and unloading of stock, is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water before the shipment is actually made.

Same—Same—Same—Bailee.—In such a case the liability of the company is no greater than that of an ordinary depositary or bailee. (Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Butler County; Good, Judge.

Action by Thomas Powers against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. Deweese and Frank E. Bishop, for plaintiff in error.
Matt Miller, for defendant in error.

OLDHAM, C. This was an action for damages originally instituted in the county court of Butler county. The petition alleged, in substance, that on the 11th day of October, 1898, the plaintiff purchased from one Geo. Higgins and others 294 head of cattle, which were, at the time of purchase, in the cattle pens of the defendant in the town of Thedford, Neb., awaiting shipment to South Omaha; that the pens were composed of rotten posts and decayed lumber, and were unfit for the purpose of keeping and maintaining cattle during the time that they were held in such yards awaiting shipment; and that on the night of the 11th day of October, 1898, the cattle broke out of said yards between the hours of midnight and 4 o'clock next morning. The petition then alleges that the plaintiff was put to great annoyance and trouble in pursuing the cattle, and was forced to expend considerable money in employing herders to search for and drive back the said cattle, and that he was delayed from Wednesday until Saturday in procuring the shipment of the cattle to South Omaha. He prayed for judgment for \$1,000. Defendant answered, specifically denying that the cattle had ever been delivered to and accepted by it for purposes of shipment. On issues thus joined there was a trial to a jury, a verdict for

*See foot-notes appended to *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

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plaintiff for \$250, and judgment on the verdict. To reverse this judgment, defendant brings error to this court.

The only allegation in the petition in error necessary to be examined is that the evidence is not sufficient to sustain the judgment. The facts underlying the controversy are that on the 11th day of October, 1898, plaintiff, Powers, came to the village of Thedford for the purpose of going to a ranch on which part of the cattle in controversy were kept, to see if he could purchase them. He inquired of the station agent of the defendant railroad company if he could get a stage out to the ranch. The agent told him that the stage had gone, but that the owners of the cattle were driving them to town that day, and that they would be in Thedford in the evening for shipment next day to South Omaha. Powers got a conveyance, and went to meet the owners of the cattle. He began negotiating for the purchase of the herd, which was owned by three different men of the names of Higgins, Edinger, and Spencer. He had not succeeded in effecting the purchase when the cattle arrived at Thedford, and the owners had put them in the stock pens of the defendant, near its railroad tracks. After the cattle were yarded, Powers consummated a purchase of the entire herd from the different owners, and notified the station agent of the defendant that he would ship the cattle the next day, as the others had intended to do. Plaintiff seems to have looked after his stock from time to time until about 12 o'clock at night. At about sunrise in the morning Higgins, one of the former owners of the cattle, went down to the pens, as he says, to let the cattle out and feed, water, and range them. He discovered that the side of the pens furthest from the track had been broken through, and the herd all gone and scattered over the range. In the panel of the fence that was broken Higgins and plaintiff each testify that they found three post that were rotted below and up to the surface of the ground. They made no claim of any rotten or decayed boards on the sides of the pen, but concluded from the fact of three post being rotted that the fence was insecure and unfit to hold cattle yarded for shipment. Defendant, on the other hand, introduced evidence, which was undisputed, tending to show that the pens had been thoroughly repaired by the repair foreman of the company but 30 days before the escape of the cattle. New and strong post had been firmly set in the ground between each of the posts which had rotted below the surface of the ground, and the boards, all off which were sound and sufficient, had been firmly nailed to these new posts. The evidence of the defendant further tended to show that the herd of cattle had been taken from the range, and had been stampeded by fright at a passing train, and had surged with such violence against the sides of the pen that they had broken new boards on the fence and pushed the new posts out of the ground.

Now, the question to determine is whether or not there is any competent evidence in the record to show that defendant company had received the cattle unconditionally for immediate shipment

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on the evening of the 11th day of October, 1898. That defendant's station agent permitted the owners of the cattle to yard them in the pens of the defendant company is beyond dispute. But it is also beyond question that the owners knew, when they put the cattle in the pens, that there would be no engine to take the cars to South Omaha until about 11 o'clock next day. It is also clearly shown that the owners of the cattle intended to take the stock out of the pens in the morning to feed, water, and range them until about 10 o'clock. We think the rule well established that when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. *Kansas City Co. v. Barnett*, 61 S. W. (Ark.) 919. But we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier. And where a railroad company constructs yards by the side of its tracks to facilitate the loading and unloading of stock, it is not responsible as a common carrier for stock placed in such yards for the convenience of the owner, who intends to ship on a subsequent day, and reserves the privilege of taking the stock from the pens for the purpose of feeding and caring for them before the shipment is made. In such a case the liability of the company is no greater than that of an ordinary depository or bailee. *Ry. Co. v. Murphy*, 60 Ark. 338, 30 S. W. 420, 46 Am. St. Rep. 202; *Mo. R. R. Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402.

We are therefore of opinion that the evidence is insufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

AMES and LETTON, CC., concur.

PER CURIAM. For the reasons given in the above opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

SAVANNAH, F. & W. RY. CO. *v.* TOLBERT.

(Supreme Court of Georgia, June 16, 1905.)

[51 S. E. Rep. 401.]

Carriers—Lien for Freight.*—A carrier acquires no right, by virtue

*For the authorities in this series on the right of the carrier to a lien on freight, see foot-notes appended to *Thomas v. Frankfort, etc., R. Co.* (Ky.), 9 R. R. R. 842, 32 Am. & Eng. R. Cas., N. S., 842; *Wabash R. Co. v. Pearce* (U. S.), 11 R. R. R. 655, 34 Am. & Eng. R. Cas., N. S., 655 (right of terminal carrier to lien on account of duties paid on bonded goods not defeated by wrongful change of destination by initial carrier, to owner's damage, where each carrier's liability is lim-

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of its employment as such, to hold goods delivered to it by a wrongdoer, to whom they do not belong, until the charges are paid, against the claim of the true owner; nor has the carrier any lien on the goods for the transportation charges.

Appeal—Review—Questions Not Raised Below.—The Supreme Court will not pass on a question not made in the trial court. Thus where the sole prayer of the petition is for injunction, and the defendant, without demurring, pleads to the merits, and consents to a trial on the merits by the judge without a jury, he cannot, after an adverse judgment, for the first time raise the point in a direct bill of exceptions that the plaintiff had not pursued his proper remedy.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by T. M. Tolbert against the Savannah, Florida & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This case arose upon a petition brought by T. M. Tolbert against the Savannah, Florida & Western Railway Company to enjoin it from selling a certain mare under a claim of lien, as provided under sections 2303 and 2304 of the Civil Code of 1895, for freight charges. The petition alleged that the plaintiff is the owner of a certain dark-bay mare, of the value of \$300, which is held by the defendant; that the defendant is seeking to wrongfully sell the mare under the named sections of the Code under a claim of lien for the sum of \$74 freight charges; that said mare was wrongfully received by the defendant; that she was shipped by the plaintiff's direction from Rochester, N. Y., to his brother, H. Tolbert, at Columbus, Ohio, under bill of lading, a copy of which is attached to the petition; that the mare arrived at Columbus, Ohio, in due or reasonable time; that, without plaintiff's knowledge or consent, and without the knowledge or consent of the consignee, the mare was transported in some way from Columbus, and got into the possession of the defendant, without the knowledge, authority, or consent of the plaintiff, the consignee, or any authorized agent of the plaintiff; that the transportation was entirely voluntary, and that the defendant had no right to charge freight for such transportation, and had no lien on the mare for such charges; that the defendant refuses to deliver the mare to the petitioner, or to refrain from selling the same under its alleged claim of lien. The prayer was for an injunction to restrain the sale, and to prevent the enforcement of the lien for freight charges. The defendant, in its answer, admitted the possession of the mare, and that it was seeking to sell her, under sections 2303 and 2304 of the Code, for the payment of its lien for freight charges in the sum of \$74.90. It averred that it received the mare in the usual and ordinary business way from the Louisville & Nashville Railroad Company at Montgomery, Ala., and transported her from Montgomery to Valdosta, Ga., in good faith; that defendant's possession of the mare is a legal possession, because it was

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received in the ordinary and usual course of business, and brought by the defendant to the place of destination in good faith; that after reaching said destination the mare could not be delivered, and the defendant is therefore holding the same for its freight charges; that the mare was shipped from Cincinnati, Ohio, to Valdosta, Ga., and a bill of lading was issued at Columbus, Ohio, to H. Tolbert, and that the mare was shipped to Valdosta by said H. Tolbert; that defendant and its connecting lines transported the same according to the shipping contract; that when the mare reached Valdosta the consignee refused to accept the same and to pay the freight charges.

The case came on to be tried on its merits before the judge of the superior court, without a jury, upon such an agreed statement of facts and certain evidence which was introduced. It was agreed by the parties that on June 30, 1901, W. E. Foster delivered the mare to the New York Central & Hudson River Railroad Company at Rochester, New York, to be transported to Columbus, Ohio, said railroad company accepting and delivering its bill of lading, the material parts of which are as follows:

"New York Central & Hudson River R. R. Co. Received subject to the classification in effect on the date of issue of this bill of lading at Rochester Station, July 30, 1901, from W. E. Foster, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below, which said company agrees to carry to said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed in consideration of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

"Marks: Consignee, H. Talbot, Destination, Columbus, Ohio.

"Car, D 22867.

"A. R. Laurence, Agent.

"(The signature of the Agent here acknowledges only the receipt of the property and the charges advanced, if any.)"

"[One cent revenue stamp.]

"NYC 7-30, 1901.

"[On the other side.] Not negotiable. If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 9 of the conditions of the Uniform Bill of Lading, on the back hereof."

Among the conditions placed on the back of said bill of lading,

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which is headed, "New York Central & Hudson River R. R. Co. Uniform bill of lading conditions," is the following:

"(5) Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be at the option of the carrier removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges."

"(9) If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned (without any condition or limitation other than the name of the party to be notified on the arrival of the property, the surrender of this bill of lading properly endorsed shall be required before delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading."

"(10) Owner or consignee shall pay freight at the rate herein stated and all other charges accruing on said property before delivery and according to weights as ascertained by any carrier hereunder."

It was further admitted that the mare was transported under this bill of lading to Columbus, Ohio, but was not delivered to H. Tolbert, the consignee, who lived there, but came on to Valdosta without his knowledge or consent, and that it is now at Valdosta, and is claimed by, and is the property of, the plaintiff. It was further agreed that the defendant received the mare from the Louisville & Nashville Railroad Company at Montgomery, Ala., in good faith and in the usual course of business, and that the amount of advanced charges mentioned in the waybill was paid by defendant to its connecting lines, and that the charges of \$15.32 by the defendant is a reasonable charge for the transportation of the mare from Montgomery to Valdosta; that the material parts of the waybill are as follows: "Plant System of Railways, Collect way-bill; Waybill series and No. LP 497, date, Aug. 5, 1901, LS & MS Car 22867, From Montgomery to Valdosta, Ga., via Alb. Consignor, L&N, Cinti. 258 8-2, 1901. Columbus, O, CCC&St. L. Consignee, H. Talbot, Valdosta. Articles, 1 Horse, Released. Weight, 2000, Class 2, Advanced charges, \$59.62, Freight \$15.32, Collect \$74.94."

It was further agreed that Leonard Johnson was the man in charge mentioned in the bill of lading, that he had the bill of lading in his possession, and surrendered the same to the initial carrier at Columbus, Ohio, and directed that the mare be shipped to Valdosta, and that it was shipped under this direction. The plaintiff also introduced the following oral testimony: T. M. Tolbert: "I know Leonard Johnson. On August 30, 1901, he was a half-grown negro boy, uncouth, fifteen or sixteen years old, such as we have around here on the streets. He did not have any business with the horse. He was put in charge of the

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horse, looking after it in the car, and taking care of it. His duties were to feed and water the horse." On cross-examination he testified: That Leonard Johnson was in Rochester, N. Y., when the mare was shipped to Columbus, Ohio. That he did not know that Johnson was there. Did not know whether he was dressed in broadcloth at the time he was put in charge of the mare. He had not seen him for 3½ months prior to that time, and did not know what Johnson's duties were in reference to the mare, except what somebody else told him. He did not know what instructions or restrictions as to the management or control of the mare were placed upon Johnson by the person who put him in charge. Neither did he know about what information was given to the Hudson River Railroad Company as to the boy's relation to the mare, or as to the right or authority he had over it. The defendant introduced J. F. Passmore, who testified that he knew Leonard Johnson; that he was at that time from 20 to 25 years old, and that in 1901 he looked like he would weigh 130 or 135 pounds, and that mentally he was a bright "fellow"; that he weighs now about 165 pounds; that he is a follower of race horses; that he did not know his business, but has seen him about the stables at the fair grounds; that he would lead the horses around, cooling them off, after they had run their races; that he did not know that Johnson was exercising authority or ownership over any of the horses when he saw him thus engaged. Upon the agreed facts and the evidence introduced, the court rendered a judgment in favor of the plaintiff, granting a perpetual injunction against the defendant, to which judgment the defendant excepts, alleging that the judgment is contrary to law, and without evidence to support it for the reasons, first, that the agreed statement of facts and the evidence submitted showed that the defendant, as a common carrier of freight for hire, received the mare in good faith from its connecting road, and while the mare was in the custody of Leonard Johnson, who had been placed in charge of the same by the consignee; second, that the agreed statement of facts and the evidence showed that the plaintiff had a complete and adequate remedy at law by an action of trover against the defendant; third, that the agreed statement of facts and evidence showed that the defendant had neither done nor threatened to do any act which was illegal, nor was it guilty of any conduct which would authorize the granting of an injunction, but, on the contrary, it was only proceeding lawfully to collect freight charges which were due and which had been advanced to its connecting lines of carriers, and for a proper freight charge which was due to the defendant, as a common carrier, for transporting the freight which it had received in good faith.

Kay, Bennet & Conyers and Cranford & Walker, for plaintiff in error.

W. H. Griffin and A. T. Woodward, for defendant in error.

EVANS, J. (after stating the facts). 1. The right of the rail-

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road company to collect its transportation charges is dependent upon whether the person who started the shipment of the mare from Columbus to Valdosta had authority to direct such shipment. It is contended that Leonard Johnson, who was in charge of the mare when it left Rochester, N. Y., was clothed by the consignor with apparent authority to direct this shipment from Columbus to Valdosta. The bill of lading which the New York Central & Hudson River Railroad Company issued to Foster stated that there was a man in charge of the "horse." This man was Leonard Johnson, and it is inferable from the evidence and agreed statement of facts that he had no authority over the mare except to feed, water, and look after its general welfare while in transit. It is true that he had possession of the bill of lading, but that bill of lading authorized a delivery to the consignee without its production. It was the duty of the carrier to deliver the mare to the consignee, and it was liable for a delivery to any other person than the consignee named in the bill of lading, or his authorized agent. When the mare arrived at Columbus it was not delivered to the consignee, Tolbert, but, without his knowledge or authority or consent, was reshipped over the line of defendant's road and its connecting carriers. The delivery to Johnson at Columbus was wrongful, and Johnson's possession was that of a wrongdoer. He had no authority either to receive the mare, or to continue the shipment from Columbus to Valdosta. His surrendering the bill of lading in his possession to the initial carrier at Columbus, and directing that the mare be shipped to Valdosta, was without the knowledge or consent of either the consignee or the owner. "A carrier acquires no right by virtue of its employment as such, to hold the goods delivered to it by a wrongdoer, and to whom they do not belong, until the charges are paid, against the claim of the true owner, and it therefore has no lien upon them, but must, on demand, surrender them to the owner." Hutch. Car. § 491. This rule is based upon that universal principle that no one's property can be taken from him without his consent, expressed or implied. It is not a harsh rule, as applied to common carriers, for the reason that the carrier has the right to demand of the consignor the transportation charges in advance. When a carrier receives goods for shipment from one who has neither title nor rightful possession, the true owner may reclaim the goods wherever found. The right of a connecting road is no better than that of the initial carrier, in the collection of its freight charges, even though it may have received the goods in good faith, and without notice that the consignor's possession was wrongful and fraudulent. The liability in such case is on the principle that the true owner of personal property has the right to the possession of his property which has been fraudulently taken from him, even though it be found in the possession of an innocent purchaser. And in such cases the true owner is not liable for any expenses to which the person in possession may have been put, either in the purchase of the property or otherwise. The evidence in this case author-

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ized the finding that the possession of Johnson, who started the shipment from Columbus to Valdosta, was tortious, and that the shipment was made without authority from either the consignee, in Columbus, or the plaintiff, who resided in Valdosta. It follows, therefore, that the defendant is not entitled to its freight charges, however reasonable they may be, and that it has no lien therefor. It was not error for the court to permanently enjoin the collection of the charges by sale under the provisions of the Code.

2. The plaintiff in error further contends that the judgment of the court is erroneous for the reason that the evidence disclosed that the plaintiff had an adequate and complete remedy at law by an action of trover. If the defendant desired to avail itself of the objections that the owner had gone into a court of equity and invoked the aid of that court, when his remedy at law was complete, it should have done so by appropriate demurrer. It cannot submit the determination of the case to a court of equity, and, after an adverse judgment, for the first time raise the point that the plaintiff has not pursued the proper remedy. The only prayer in the petition was for injunction. The only issue submitted to the court by the pleadings was whether, under the acts, the plaintiff was entitled to relief by injunction. The failure of the railroad company to demur at the proper time, and the trial of the case by the judge without a jury, amounted to a consent that the issue made by the pleadings should be determined in that manner; and it is now too late, after the case has been decided, to raise the question that the plaintiff's legal remedy was ample, and that there was therefore no necessity to invoke the extraordinary powers of a court of equity. See *Hay v. Collins*, 118 Ga. 247, 248, 44 S. E. 1002.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

TUCKER v. BOSTON & M. R. R.

(Supreme Court of New Hampshire, Belknap, Jan. 3, 1905.)

[59 Atl. Rep. 943.]

Accident at Crossing—Negligence—Signals.—Under Pub. St. 1901, c. 159, § 6, requiring railroads to cause a bell to be rung on approaching a crossing, the failure to ring a bell is evidence of negligence.

Same—Failure to Ring Bell.—In an action against a railroad for the death of a person in a crossing accident, evidence examined, and held sufficient to sustain a finding that the bell on defendant's engine was not rung.

Same—Evidence—Habits of Deceased.*—Where there was no direct evidence of the conduct of deceased as he approached the crossing, evidence of the habit and custom of deceased to stop, look, and listen

*See note at end of case.

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for trains when approaching the crossing where the accident occurred was admissible.

Same—Same—Same.—Where there was no direct evidence of the conduct of deceased as he approached the crossing, evidence that deceased was familiar with the crossing, and that it was his habit and custom to stop, look, and listen for trains when approaching the crossing where the accident occurred, is sufficient to sustain a finding that deceased was in the exercise of due care.

Transferred from Superior Court; Stone, Judge.

Action by William H. Tucker, administrator, against the Boston & Maine Railroad. Defendants' motion for nonsuit denied, subject to exception. Transferred from the superior court. Exceptions overruled.

Case for negligence. Trial by jury, and verdict for the plaintiff. The defendants' motion for a nonsuit was denied, subject to exception. Transferred from the March term, 1904, of the superior court by Stone, J. The plaintiff's evidence tended to prove the following facts: About 5 o'clock on the afternoon of January 29, 1903, the plaintiff's intestate, while driving over a grade crossing in Andover, was struck by a southerly bound train and fatally injured. He was riding in a sleigh drawn by a safe horse, and was returning from Franklin to his home in Andover. He was observed when about 150 feet distant from the crossing, and was not again seen until just as the train struck him. The afternoon was quite dark, and the weather was foggy and misty. The locomotive whistle was duly sounded. There was no evidence that the bell was rung. Two witnesses who heard the whistle testified that they did not hear the bell, although they were in a position to do so if it had been rung. On cross-examination both declined to testify that the bell was not rung. Neither of the witnesses noticed the headlight, and there was no other evidence concerning it. The train was somewhat late, and was running at a high speed, but whether faster than the usual rate did not appear. One approaching the crossing from the direction of Franklin cannot see the track until he is within about 30 feet of it, at which point a view can be had up the track for 30 or 40 rods; and when one is within 10 or 15 feet of the crossing the track is visible in the direction of Andover for a distance of 80 rods. There is another grade crossing about half a mile nearer Andover than that where the accident occurred. The track is on a descending grade all the way from Andover to Franklin. Evidence that it was the habit and custom of the deceased to stop, look, and listen for trains when approaching the crossing where the accident occurred, with which he was perfectly familiar, was admitted, subject to the defendants' exception.

Oscar L. Young and Shannon & Tilton, for plaintiff.

Jewett & Plummer and George W. Stone, for defendants.

PARSONS, C. J. The failure of the defendants to ring the bell

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upon approaching the crossing, as required by statute, was evidence of a breach of duty owed by them to the deceased, a traveler upon the highway. Pub. St. 1901, c. 159, § 6; *Batchelder v. Railroad*, 72 N. H. 528, 57 Atl. 926. Upon the evidence that two persons who were in a position to hear the bell, if rung, did not hear it, and in the absence of any evidence that the bell was rung, or of any explanation of the failure to call witnesses upon that point (*Mitchell v. Railroad*, 68 N. H. 96, 117, 34 Atl. 674), the finding that the bell was not rung cannot be set aside as contrary to reason.

Upon the question of the deceased's care and the exception to the evidence of custom, the case is not distinguishable from *Smith v. Railroad*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596. The distinction between these cases and *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426, and *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443, is that in the latter cases the evidence disclosed the conduct of the party injured, as he approached the point of danger, and it conclusively appeared that he went upon the crossing without any effort to ascertain whether a train was coming, and there was no evidence excusing or explaining his conduct. In *Smith v. Railroad*, and the present case, the conduct of the deceased as he approached the crossing is not disclosed by direct evidence. Upon this question his custom and habit is evidence, and from such evidence the exercise of care may be found, if it does not conclusively appear that in the particular instance such custom was not observed. *Stone v. Railroad*, 72 N. H. 206, 55 Atl. 359.

Exceptions overruled. All concurred.

NOTE.

**HABITS AND CHARACTER, CUSTOM AND USAGE—
ADMISSIBILITY OF EVIDENCE OF IN NEGLI-
GENT CASES.**

I. Habits or Character.

- A. Admissibility on Question of Defendant's Negligence or Incompetency.
 - 1. General Rule.
 - 2. Limitations of and Exceptions to General Rule.
- B. Admissibility on Question of Negligence in Employing or Retaining Negligent Servant.
- C. Whether Defendant Can Show His Own Habits or Character.
- D. Whether Admissible for Purpose of Showing That Servant Was Careful or Skillful on Particular Occasion.
 - 1. General Rule.
 - 2. Limitations of and Exceptions to General Rule.
 - 3. Where Master Charged with Negligence in Employing or Retaining Servant.
- E. Whether Admissible for Purpose of Showing Contributory Negligence.
- F. Whether Plaintiff Can Show His Own Habits or Character.

Note**G. Whether Plaintiff May Show Habits or Character of His Decedent.****1. Where No Evidence as to Cause of Accident.****a. General Rule.****b. Minority Doctrine.****2. Where Evidence as to Cause of Accident.****H. Defendant Cannot Show Habits or Character of Plaintiff's Decedent.****I. Habits or Character of Domestic Animals Inflicting or Causing Injuries.****J. Whether Admissible as Bearing on Question of Measure of Damages.****II. Custom and Usage.****A. Cannot Justify or Excuse Negligence.****B. When Admissible for Purpose of Justifying or Excusing Alleged Negligence.****C. Whether Plaintiff May Show Defendant's Violation of General Usage Applicable to Particular Business or Work.**

Cross References—Admissibility of Evidence of Habits or Reputation as Bearing on Question of Negligence or Contributory Negligence.—See foot-note appended to *Shelly v. Philadelphia & R. Ry. Co. (Pa.)*, 17 R. R. R. 835, 40 Am. & Eng. R. Cas., N. S., 835; *Southern Pac. Co. v. Hetzer (C. C. A.)*, 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; *Texas & P. Ry. Co. v. Coutourie (C. C. A.)*, 16 R. R. R. 642, 39 Am. & Eng. R. Cas., N. S., 642; *Bank of Irwin v. American Express Co. (Iowa)*, 15 R. R. R. 245, 38 Am. & Eng. R. Cas., N. S., 245.

I. HABITS OR CHARACTER.**A. ADMISSIBILITY ON QUESTION OF DEFENDANT'S NEGLIGENCE OR INCOMPETENCY.****1. General Rule.**

Although the authorities are not altogether in harmony, it may be stated as a general rule, supported by the greater weight of authority, that plaintiff cannot show that defendant was incompetent or habitually careless, for the purpose of raising a presumption that he was negligent or unskillful in a particular instance.

Illinois.—*City of Galesbury v. Hall*, 45 Ill. App. 290; *Fitzpatrick v. Bloomington City Ry.*, 73 Ill. App. 516.

Iowa.—*Hubbard v. Town of Mason City*, 60 Iowa, 400, 14 N. W. 772.

Kentucky.—*Eskridge's Ex'rs v. Cincinnati, New Orleans, etc., Ry. Co.*, 89 Ky. 367, 12 S. W. 580, 42 Am. & Eng. R. Cas. 176.

Maryland.—*Bannon v. Baltimore & Ohio R. Co.*, 24 Md. 108.

Massachusetts.—*Gahagan v. Boston & Lowell R. Co.*, 83 Mass. 187.

Michigan.—*Kingston v. Ft. Wayne & E. Ry. Co. (Mich.)*, 9 Am. & Eng. R. Cas., N. S., 259.

New York.—*Senecal v. Thousand Island Steamboat Co.*, 29 N. Y. Supp. 884, 79 Hun 574.

Pennsylvania.—*Baltimore & Ohio R. Co. v. Colvin*, 118 Pa. St. 230, 12 Atl. 337.

Texas.—*Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96; *Missouri, K. & T. Ry. Co. v. Johnson (Tex.)*, 12 Am. & Eng. R. Cas., N. S., 824.

Evidence of a custom or the habitual conduct of defendant is not admissible to show the existence or absence of negligence in a given

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case. So held in *Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

Person's Habitual Negligence on Similar Occasions.—In *Missouri, K. & T. Ry. Co. v. Johnson* (Tex.), 12 Am. & Eng. R. Cas., N. S., 824, it is said in the opinion: "We think the rule is well settled that when the question is whether or not a person has been negligent in doing, or in failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon similar occasions."

Accident at Crossing—Failure to Give Signals from Other Trains—Usual Custom.—On the issue whether signals were given by those in charge of a train approaching a crossing, evidence was not admissible to prove that other trains did not give signals as they approached the crossing, or that trains did not usually do so, as whether a signal was given at the approach of a train to a crossing on a particular occasion is a question of fact that cannot be affected one way or another by showing the conduct of subordinate officers or servants in charge of some other train or trains who may or may not be mindful of their duty. So held in *Eskridge's Ex'rs v. Cincinnati, New Orleans, etc., Ry. Co.*, 89 Ky. 367, 12 S. W. 580, 40 Am. & Eng. R. Cas. 176.

Injury to Child—Custom to Move Cars over the "Y" without Look-out.—In an action for injuries to a child, run over by a train, plaintiff offered evidence, for the purpose of showing negligence on the part of defendant, that it was the daily practice of defendants to move their cars without a guard at the rear of the train, over the "Y", which was so situated that the engineer at the engine could not see the rear. It was held that this evidence was collateral and incapable of affording any reasonable presumption or inference as to the matters in issue, and was properly excluded. *Bannon v. Baltimore & Ohio R. Co.*, 24 Md. 108.

Carelessness at Time of Accident—Reputation of Crossing Flagman.—Evidence of the general reputation of a flagman at a railroad crossing for carelessness is incompetent to prove his carelessness on a particular occasion. So held in *Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230, 12 Atl. 337.

General Neglect of Another Street Light.—Where the question at issue is the condition of a street light at the time and place of the accident, evidence tending to show a general neglect by defendant of a neighboring light is not admissible. So held in *City of Galesbury v. Hall*, 45 Ill. App. 290.

Cars Permitted to Stand in Highway—Usage of Railroad.—In an action for injury at a railroad crossing, from being crushed between cars, alleged to have been negligently permitted to stand in the highway, evidence of the usage of the railroad in regard to its use of the highway was incompetent to prove its negligence at the time of the accident complained of. So held in *Gahagan v. Boston & Lowell R. Co.*, 83 Mass. 187.

Habit of Refusing to Adopt Improved Spark Arresters until Expiration of Patents.—In an action for the destruction of property by fire started by one of defendant's locomotives, it was error to admit evidence of a habit of the defendant railroad of refusing to adopt certain appliances to modify the discharge of smoke from its locomotives, on account of the cost, until after the patents on them had expired, as such evidence could not show whether the spark arresters used by defendant were up to the standard required, and did tend to create prejudice against defendant. *Pennsylvania R. Co. v. Page* (Pa.), 12 Atl. 662.

Burning of Mill—Liquor Habit, or Occasional Intoxication of Engineer and Fireman.—In an action for damages resulting from the burning of a mill, evidence is inadmissible to show that the engineer and fireman of the mill were in the habit of using intoxicating liquor, and were sometimes seen under its influence, where there was no

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proof that such liquor habit, or occasional intoxication, had any bearing upon the origin of the fire, or in any way prevented its extinction. So held in *McNally v. Colwell*, 91 Mich. 527, 52 N. W. 70.

Street Car Accident—Motorman's Prior Use of Liquor.—Evidence to show the habits of a motorman operating an electric car, as to the use of intoxicating liquor prior to the day of an accident, is inadmissible, on the issue of his negligence in causing the accident. So held in *Fitzpatrick v. Bloomington City Ry.*, 73 Ill. App. 516.

2. Limitations of and Exceptions to General Rule.

Accidents in Street—Speed—Signals—Habitual Negligence of Engineer.—In an action for running an engine over plaintiff's husband, it was not error to admit evidence to show the high speed at which such engine was habitually run by the same engineer at the place of the accident, and that he habitually neglected to ring the bell. So held in *Savannah, F. & W. Ry. Co. v. Flanagan*, 82 Ga. 579, 9 S. E. 471. Here the ruling of the trial court was sustained because the question of admissibility was a doubtful one.

Crossing Accident—Engineer's Habit to Give Signals.—In an action for injuries to plaintiff, sustained in a crossing accident, there was no abuse of discretion in allowing the recollection of the engineer to be tested by inquiring whether he uniformly gave signals at crossings. So held in *Mackrall v. Omaka & St. L. R. Co. (Iowa)*, 19 Am. & Eng. R. Cas., N. S., 59.

Customary Speed of Train at Same Place Shortly Prior to Accident.—Where the evidence as to the speed at which a train was running at a certain time and place is conflicting, the rate at which the train was accustomed to be run at that place, shortly prior to the happening of the event in issue, may be given in evidence. So held in *Chicago, St. Louis, etc., Ry. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280.

Habitual Speed of Locomotives under Like Circumstances.—Where the rate of speed of the train which struck deceased is an issue, plaintiff may show that the engines of the company habitually ran, under like circumstances with the one in question, at the rate indicated by his other evidence. So held in *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103, 9 N. W. 575. In this case it is said in the opinion: "It could be given only in support of other evidence of the speed in the particular case, it does not differ materially, in principle, from proof of a rule or regulation of the defendant, fixing the rate of speed for its engineers in such cases. Such a rule or regulation would not be independent evidence that, in any particular instance, an engine was running at a prescribed rate, but it would be proper, as against the defendant, at any rate, in support of other evidence that the engine was going at that rate."

Crossing Obstructed by Cars—Usual Custom at Same Place.—On the issue whether a highway railroad crossing was obstructed on a certain occasion by defendant's cars, the manner in which their cars were usually managed at the same place may be competent evidence. So held in *Hall v. Brown*, 58 N. H. 93.

Care for Safety of Alighting Passengers—Passengers Required to Alight from Their Respective Cars—Accident at Certain Point.—Evidence that it was the custom of the carrier not to allow its passengers to go forward from one car to another in getting out at stations; that the rear car of a train was frequently stopped at a certain point; and that several witnesses had been jarred and shaken up in getting out of the car at that place, was admissible on the question of due care by the carrier in providing for the safety of passengers in alighting from the car at such place. So held in *Bullard v. Boston & Maine Railroad*, 64 N. H. 27, 5 Atl. 838.

Whether Light on Tender—Habit of Running Train without Light on Tender.—On the issue whether there was a light on the tender at

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the time of the accident, where the evidence on the question was conflicting, evidence was admissible to show that defendant's employees were in the habit of running the train at this point with the engine reversed and with no light on the tender. So held in *Lannis v. Louisville, etc., Ry. Co. (Ky.)*, 16 Ky. Law Rep. 446.

Habit of Locomotive Engineers to Keep Ash-Pan Dampers Open.—In an action for damages from a fire set by a locomotive, the testimony of a former engineer that he generally kept both dampers of the ash-pan open, except when going over a bridge, and that other engineers for whom he had fired did the same, is competent to show the habit on defendant's road of running the engines with both dampers open. So held in *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, 44 Pac. 423, 46 Pac. 726.

Custom of Burning Wood in All Defendant's Engines.—In an action for the destruction of property by fire set by one of defendant's locomotives, where it appears that all of defendant's engines are coal-burners, and that it is more dangerous to burn wood in such engines than coal, plaintiff (a stranger to the company) may show that defendant was burning wood in all its engines in general, without proving by direct evidence that wood was being burned in the engine which set the fire complained of, as such evidence would tend to show that defendant was burning wood in such engine at the time his property was destroyed. So held in *St. Joseph & Denver City R. Co. v. Chase*, 11 Kan. 47.

Fires—"Negligent Habit" as to Construction and Use of Locomotives.—In an action for the alleged destruction of property by fire set by one of defendant's locomotives, by reason of its negligent construction and management, it was held that evidence offered to prove a "negligent habit" of defendant as to the construction and use of its engines was properly confined to such as tended to show the prevalence of such habit at or about the time of the destruction of plaintiff's property. *Davidson v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 51, 24 N. W. 324.

Fire Habitually Scattered by Defendant's Locomotives.—On the question of the origin of the fire which destroyed plaintiff's property, evidence is admissible to show that defendant's locomotives running over that part of the road where such property was situated, at or about the time of the fire in question, habitually scattered fire from ash-pans in the vicinity of plaintiff's property. So held in *Cleveland v. Grand Trunk Ry. Co. of Canada*, 42 Vt. 449.

Particular Engine Not Identified—Emission of Sparks—General Behavior of Company's Locomotives.—In an action for the destruction of property by fire, alleged to have been started by one of defendant's locomotives, where the particular engine cannot be identified, evidence is admissible to show the general behavior of defendant's locomotives in respect to the throwing of sparks upon the same portion of the road within a reasonable time before the destruction of plaintiff's property. So held in *Hoskinson v. Central Vt. R. Co.*, 66 Vt. 618, 30 Atl. 24.

Habitual Use of Defective Spark Arresters.—In an action for the destruction of property by fire started by one of defendant's locomotives, where the engine which set the fire cannot be identified, evidence tending to show the habitual use on the road of insufficient spark arresters is admissible, on the question of the negligence of the railroad company. So held in *Gowen v. Glaser (Pa.)*, 10 Atl. 417.

Absence of Direct Evidence of Condition of Locomotive—Evidence That Engines Frequently Set Fires in Same Vicinity—Custom to Pass with Spark Arresters Laid Back.—In an action for the destruction of property by fire, alleged to have been set by one of defendant's locomotives, evidence is admissible to prove, where there is no direct evidence as to the condition of such engine, that defendant's trains frequently set fire to fences and grass along the line of the road, in the

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vicinity of plaintiff's property, and that trains usually passed with the screen or fender laid back, as such evidence tended to show the origin of the fire complained of. So held in *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165.

Fire—Custom to Run Trains at Unlawful Speed.—Evidence is admissible to show that defendant's trains were usually run past the point where the fire in question started at an unlawful rate of speed. So held in *Bennett v. Missouri, K. & T. Ry. Co. of Texas*, 11 Tex. Civ. App. 423, 32 S. W. 834. But the court considered such evidence to be of little weight.

Derailment of Train—Engineer's Habit of Drinking.—In an action for personal injuries from the derailment of cars, evidence is admissible to show, in support of the allegation in the complaint that the employers in charge of the train were intoxicated at the time of the accident, that the engineer of the train was in the habit of drinking intoxicating liquor, and of visiting a certain saloon, evidence having been introduced tending to prove that he had drank intoxicating liquor at the last station passed by the train before the injury, and about thirty minutes before the accident. So held in *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

Cotton Destroyed by Fire While Piled on Dock—Negligence—Probable Condition of Carrier's Superintendent—Habitual Intoxication and Neglect of Duties.—In *Texas & P. Ry. Co. v. Contourie* (C. C. A.), 16 R. R. R. 642, 39 Am. & Eng. R. Cas., N. S., 642, 135 Fed. 465, where the destruction of a large quantity of cotton by fire, while it was piled in and around sheds on a dock, was charged to have been due to a course of negligent conduct on the part of the agents and servants of defendant, who was in possession of the cotton as carrier, in so piling the cotton as to subject it to unnecessary danger, and render it difficult to discover a fire, if one should start, in time to stop it, by allowing cotton to be piled over the fire apparatus so that it could not be used; and in failing to provide sufficient or competent watchmen, it was held competent for plaintiff to show that defendant's superintendent in charge of the dock, whose duty it was to attend to such matters, habitually became intoxicated and neglected his duties during the time the cotton was being placed on the dock, as such evidence tended to show whether the condition of the superintendent was such that he could not have properly discharged his duties.

Injury to Employee—Engineer's Habitual Intoxication, and Recklessness in Running Train.—In an action for injuries to an employee, from alleged negligence in starting the construction train upon which he was about to return to work, it was competent to prove that the engineer was habitually intoxicated, and a reckless runner, as tending to show that he was negligent at the time of the accident. So held in *Hobson v. New Mexico & A. R. Co. (Ariz.)*, 11 Pac. 545.

Whether Light on Tender—Habit of Placing Light Every Night—Rebuttal—Habit of Running without Light.—On the issue whether a train was run at night with the engine reversed and with no light on the tender, where defendant's witnesses, in testifying that the light was upon the tender on the occasion in question, stated that they knew such fact from their universal habit of putting the light there each night, it was competent for plaintiff to show in rebuttal that defendant's employees were in the habit of running the train at this point with the engine reversed and with no light on the tender. So held in *Lannis v. Louisville, etc., Ry. Co. (Ky.)*, 16 Ky. Law Rep. 446.

Crossing Accident—Signals—Usage of Defendant's Other Engineers.—In a prosecution for negligence in killing a person at a railroad crossing, when evidence of the usage of other engineers of other trains on the same road, in regard to giving the statutory signals, is not incompetent as matter of law, it may be excluded on the

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ground that, as a matter of fact, the usage of other engineers has so remote a bearing on the case that it would be unreasonable and unjust to prolong and complicate the trial by the investigation of such a collateral question. So held in *State v. Boston and Maine Railroad*, 58 N. H. 410.

B. ADMISSIBILITY ON QUESTION OF NEGLIGENCE IN EMPLOYING OR RETAINING NEGLIGENT OR INCOMPETENT SERVANT.

But on the issue of negligence in employing or retaining an unskillful or careless servant, plaintiff may show, in order to charge defendant with notice, that such servant was, or was reputed to be, incompetent or habitually negligent.

United States.—*Baltimore & O. R. Co. v. Henthone* (C. C. A.), 73 Fed. 634; *Oslen v. North Pac. Lumber Co.*, 119 Fed. 77.

Alabama.—*Cook & Scott v. Parham*, 24 Ala. 21; *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

Colorado.—*Acme Coal Mining Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596.

Indiana.—*Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152.

Massachusetts.—*Gilman v. Eastern R. Co.*, 95 Mass. 433; *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228.

Michigan.—*Davis v. Milwaukee R. Co.*, 20 Mich. 105; *Hilts v. Chicago & Grand Trunk Ry.*, 55 Mich. 437, 21 N. W. 878.

Missouri.—*Crane v. Missouri Pac. Ry. Co.*, 87 Mo. 588; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330, 11 S. W. 736.

New York.—*Cleghorn v. N. Y. Cent. & H. R. R. Co.*, 56 N. Y. 44.

Pennsylvania.—*Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230, 12 Atl. 337.

Texas.—*East Line & Red River R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298.

Injury to Passenger—Knowledge of Carrier of Employee's Intemperate Habits—Exemplary Damages.—In an action for injuries to a passenger from the negligence of an employee of the carrier, evidence is admissible to prove that such employee was intoxicated at the time of the accident and that the agent of the carrier knew he was a man of intemperate habits, where exemplary damages are claimed on the ground of gross negligence. So held in *Cleghorn v. N. Y. Cent. & H. R. R. Co.*, 56 N. Y. 44.

Injury to Employee—Brakeman's Reputation for Sobriety.—In an action for injury to an engineer from the negligence of a drunken brakeman, on the question whether the railroad had used due care in selecting its brakemen, it was competent for plaintiff to ask a witness whether he knew the general reputation of the brakeman for sobriety for one or two years prior to the accident and following it. So held in *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994.

Injury to Employee—Engineer's General Reputation for Drunkenness.—In an action for injury to a railroad employee, in an accident which evidence tended to show was caused by the drunken condition of the engineer of the train, evidence is admissible to prove the engineer's general reputation for drunkenness, for the purpose of showing that their common master, the defendant railroad, was negligent in retaining the engineer in its employ. So held in *Baltimore & O. R. Co. v. Henthone* (C. C. A.), 73 Fed. 634.

Malpractice by Defendant's Hospital Surgeon—Reputation for Sobriety.—In an action against a railroad by an employee for damages arising from the malpractice of defendant's hospital surgeon, it is competent to prove the reputation of such surgeon for insobriety, for the purpose of showing that the officers of the company

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had notice of his incompetency. So held in *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152.

Reputation of Negligent Employee for Habitual Drunkenness.—In an action for injury caused by the alleged negligence of a railroad employee, evidence that he was generally reputed to be an habitual drunkard at the place where he lived was admissible to show that his intemperate habits should have been known by the railroad company's officers. So held in *Gilman v. Eastern R. Co.*, 95 Mass. 433.

Injury to Employee—Engineer's Habitual Use of Intoxicants for Several Months Prior to Accident.—In an action for injuries to an employee from the negligence of an engineer in his master's employ, evidence is admissible to show that such engineer had, for several months prior to the accident complained of, habitually used intoxicating liquors to such an extent that those who came in contact with him noticed his condition, as the failure of his superiors to notice it, or their omission to make such inquiries as would disclose it, would be negligence. So held in *Hilts v. Chicago & Grand Trunk Ry.*, 55 Mich. 437, 21 N. W. 878.

Killing Stock—Engineer's Reputation for Recklessness.—In an action for the killing of stock, by reason of negligence in running a train, evidence is admissible to show that the general character of the engineer of such train was that of a reckless and untrustworthy agent, as bearing on the question of the railroad's negligence in employing him. So held in *Vicksburg & Jackson R. Co. v. Patton*, 31 Miss. 156.

Sudden Starting of Train—Injury to Employee—Reputation of Engineer.—In an action for injury to an employee from the alleged negligence of defendant's engineer in suddenly starting the train upon which plaintiff was at work, evidence of the reputation of the engineer as to carelessness was admissible, as tending to prove that defendant had notice or knowledge of the engineer's careless or negligent habits. So held in *Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

Carelessness of Engineer—Habit of Bringing Engine into Shops out of Repair.—The testimony of a locomotive engineer and machinist, who worked in defendant's shops for several months prior to the accident in question until several months after it, to the effect that a certain engineer in the employment of defendant was careless, because he had habitually brought his engine into the shop out of repair, and that the defects were such as would not have occurred if he had exercised proper care, is admissible as tending to charge the defendant with knowledge of his careless habits. So held in *Houston & T. C. Ry. Co. v. Patton (Tex.)*, 9 S. W. 175.

Railroad Track Reputed to Be in Bad Condition.—Evidence to show that a railroad track is reputed to be in a bad condition may be admissible upon the issue whether the railroad company is chargeable with notice of its condition. So held in *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

Death of Brakeman—Low Bridge—Reputation of Bridge.—In an action for the death of a brakeman employed by defendant, caused by contact with a low bridge, evidence was inadmissible, to show by general reputation, that the bridge was too low; general reputation not being competent to prove the existence of a fact. But, after a fact has been established, general reputation is admissible to show that the party sought to be held responsible on account of the existence of the fact had knowledge of its existence. So held in *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

Foreman's Reputation for Incompetency Among His Hands.—But in an action for injuries from the alleged negligence or incompetency of defendants' foreman, the latter's reputation for carelessness and incompetency among a few workmen employed under him,

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is incompetent to show that the master is chargeable with notice of his reputation and character, as it is the mere opinion of a small number of men, of which that there is no good reason to suppose the master is cognizant, or which he may be bound to consider. So held in *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003.

C. WHETHER DEFENDANT CAN SHOW HIS OWN HABITS OR CHARACTER.

Nor can defendant, as a general rule, show that he is either skillful or habitually careful, as such evidence has no tendency to show that he was free from negligence on the occasion in question.

United States.—*Harriman v. Pullman Palace Car Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 277.

Alabama.—*Montgomery & West Point R. Co. v. Edmonds*, 41 Ala. 667; *South & North Ala. R. Co. v. Chappell*, 61 Ala. 527.

Connecticut.—*Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379.

Georgia.—*Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706.

Illinois.—*Chicago & Alton R. Co. v. O'Brien*, 34 Ill. App. 155.

Iowa.—*Hall v. Rankin*, 87 Iowa, 261, 54 N. W. 217.

Maryland.—*Baltimore & Ohio R. Co. v. Shipley*, 39 Md. 251.

Massachusetts.—*Tenney v. Tuttle*, 83 Mass. 185.

Michigan.—*Boick v. Bissell*, 80 Mich. 260, 45 N. W. 55; *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534.

Minnesota.—*Jagger v. Nat. German-American Bank*, 53 Minn. 386, 55 N. W. 545.

New York.—*O'Neil v. Dry Dock, E. B. & B. R. Co.* (N. Y.), 15 N. Y. Supp. 84, 59 N. Y. Supr. Ct. 123; *Wooster v. Broadway & S. A. R. Co.*, 55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378.

Texas.—*Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

Vermont.—*Bryant v. Central Vt. R. Co.*, 56 Vt. 710; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695.

A person cannot show that he was free from negligence upon a certain occasion, by proving that he was careful and prudent on other occasions. So held in *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379.

Druggist Selling Poison for Harmless Drug.—In an action against a druggist for personal injuries from his negligence in selling a poison for a harmless drug, evidence that he was habitually careful and prudent in conducting his business was inadmissible, the rule that in a civil action evidence of the general character of the defendant is not involved in the issues, being applicable. So held in *Hall v. Rankin*, 87 Iowa 261, 54 N. W. 217.

Collision between Vehicles—Horse Left Untied—Defendant's Habits as to Carefulness.—In an action for injuries resulting for a collision between vehicles in a highway, alleged to have been caused by the negligence of defendant in leaving his horse near the highway without being tied or under the charge of any one, evidence was not admissible to show that he was a careful and cautious man, the principle, that when the precise act or omission of defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the defendant's character for care and caution, being applicable. So held in *Tenney v. Tuttle*, 83 Mass. 185.

Personal Injuries—Defendant's Track Ordinarily Kept in Good Condition.—In an action against a railroad company for personal injuries resulting from a defect in its track, evidence that it ordinarily kept its track in good condition is inadmissible, as irrele-

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vant. So held in *Fort Worth, etc., Ry. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137.

Fire—Usage of Defendant with Respect to Condition of Locomotives.—In an action for the destruction of property by a fire set by defendant's locomotive, evidence as to the usage of defendant with respect to the construction and condition of its engines is inadmissible, for the purpose of proving that the engine setting the fire was properly constructed and in a good condition at the time of the accident. So held in *Baltimore & Ohio R. Co. v. Shipley*, 39 Md. 251.

Horse Pastured by Defendant—Escape—Condition of Fence at Other Points—Carefulness of Defendant.—Where the evidence tended to show that defendant had taken plaintiff's horse to pasture without any special contract as to risk, and that the horse had escaped through a defect in the fence, at a certain point, and been killed, evidence was inadmissible to show that the condition of the fence around other parts of the pasture was good, or that defendant was reputed to be a prudent keeper of horses. So held in *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695.

D. WHETHER ADMISSIBLE FOR PURPOSE OF SHOWING THAT SERVANT WAS CAREFUL OR SKILLFUL ON PARTICULAR OCCASION.

1. General Rule.

And it follows that in an action against an employer, based upon the negligence or incompetency of his agent or servant, evidence of the agent's or servant's character or reputation with respect to skill, carefulness or sobriety is not admissible for the purpose of showing that he exercised proper care or skill on the occasion in question. *Harriman v. Pullman Palace Car Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 277; *Montgomery & West Point R. Co. v. Edmonds*, 41 Ala. 667; *South & North Ala. R. Co. v. Chappell*, 61 Ala. 527; *Boyce v. California Stage Co.*, 25 Cal. 468; *Ficken v. Jones*, 26 Cal. 618; *Towle v. Pacific Imp. Co.*, 98 Cal. 342, 33 Pac. 207; *Chicago & Alton R. Co.*, 34 Ill. App. 155; *Dunham v. Rockliff*, 71 Me. 345; *Boick v. Bissell*, 80 Mich. 260, 45 N. W. 55; *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534; *Jagger v. Nat. German-American Bank*, 53 Minn. 386, 55 N. W. 545; *O'Neill v. Dry Dock, E. & B. R. Co.*, 15 N. Y. Supp. 84, 59 N. Y. Supr. Ct. 123; *Wooster v. Broadway & S. A. R. Co.*, 55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378; *Hays v. Miller*, 77 Pa. St. 238; *Bryant v. Central Vt. R. Co.*, 56 Vt. 710; *Houston v. Brush*, 66 Vt. 331, 39 Atl. 380.

Habits of Sleeping-Car Porter as to Carefulness and Competency.—In an action against a sleeping-car company for injuries sustained by a passenger on a sleeping-car, through the alleged negligence of its porter, it was error to admit evidence to show that such porter was usually careful and competent. So held in *Harriman v. Pullman Palace Car Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 277.

Fire—Loss of Freight in Transit—Evidence for Defendant as to Skill of Conductor.—In an action against a carrier to recover the value of freight destroyed by fire while in transit, defendant cannot be allowed to adduce evidence of skill on the part of the conductor of the train at the time of the loss, unless plaintiff has first introduced proof of unskillfulness on his part. So held in *Montgomery & West Point R. Co. v. Edmonds*, 41 Ala. 667.

Collision between Car and Truck—Injury to Passenger—Carefulness of Truck Driver.—In an action for injuries to a street car passenger sustained in a collision between the car and a truck, against the owner of the truck, evidence to show that the truck driver was

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a careful driver was not admissible. So held in *O'Neill v. Dry Dock, E. & B. R. Co.*, 15 N. Y. Supp. 84, 59 N. Y. Supr. Ct. 123.

Collision between Street Car and Another Vehicle—Carefulness of Plaintiff's Driver for a Number of Years.—Where a person is injured while driving on the street, by colliding with a street car, and the negligence of his driver is sought to be imputed to plaintiff, the question is whether the driver was negligent on that occasion; therefore evidence tending to show that the driver had been in plaintiff's employ for a number of years, and had always been careful, is irrelevant. So held in *Wooster v. Broadway & S. A. R. Co.*, 55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378.

Collision between Horse and Team—Reputation of Driver.—In an action to recover the value of a horse, killed in a collision with a horse and carriage, evidence of the reputation of the driver of the latter is irrelevant and inadmissible, the issue being whether such driver was negligent at the time and place of the accident complained of. So held in *Dunham v. Rockliff*, 71 Me. 345.

Collision between Vehicles—Reputation of Driver for Carefulness.—In an action for personal injuries from the alleged negligence of defendant's driver in driving his wagon too close to plaintiff's wagon, evidence is inadmissible to show the reputation of such driver for carefulness in driving. So held in *Boick v. Bissell*, 80 Mich. 260, 45 N. W. 55. See also, *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130.

Careless and Reckless Driving—Employee's General Character for Sobriety.—In an action for injuries from the careless and reckless driving of defendant's servant, it is not competent to show the servant's general character for sobriety, and it cannot be shown any more than his general reputation as a careful driver. So held in *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534.

Injury to Stock—Condition of Gate—Whether Section Foreman Was Competent and Careful.—In an action for injuring stock on defendant's track, where the condition of a gate at a farm crossing was one of the issues involved, evidence that the foreman of the section hands of the section within which the gate was situated, whose duty it was to see that the gate was maintained in a proper condition, was a competent and careful man for the work in which he was engaged, is irrelevant and inadmissible. So held in *Chicago & Alton R. Co. v. O'Brien*, 34 Ill. App. 155.

Loss of Tow—Action for Fare—Set-Off—Negligence—Skill and Carefulness of Pilot and Engineer.—In an action for towing fare, where it was alleged in a plea of set-off that the tow was lost by the negligence of the tow-boat crew, and defendant introduced evidence tending to show that such loss was caused by the negligence of plaintiff's pilot and engineer, evidence was not admissible to show that such officers were competent, skillful and careful. So held in *Hays v. Miller*, 77 Pa. St. 238.

Defective Derrick—Habitual Carefulness of Inspector.—In an action for injuries to an employee, alleged to have resulted from a defective derrick, it can not be shown in defence that their servant who was charged with the oversight of the machine was ordinarily a careful man in the discharge of such duty. So held in *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

Fire Set by Locomotive—Habitual Carefulness of Section Man.—In an action for the destruction of property by fire communicated by a locomotive, the testimony of defendant's road-master, as an expert, was not admissible to prove that its section man who had charge of the section where the fire originated, was a "careful, prudent, and attentive man" in the discharge of his duties, as it would have no tendency to prove that he had properly performed his duties on the occasion in question. So held in *Bryant v. Central Vt. R. Co.*, 56 Vt. 710.

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Failure to Protect Holder of Dishonored Note Left with Bank for Collection—Reputation of Collection Clerk for Carefulness.—In an action against a bank for failure to take all necessary steps to protect the rights of the holder of a dishonored note, which had been left with the bank for collection, evidence was inadmissible to show that defendant's collection clerk was a cautious and careful man, and that this was the only error ever attributed to him. So held in *Jagger v. Nat. German-American Bank*, 53 Minn. 386, 55 N. W. 545.

Testimony as to Care Exercised in Selecting Drivers for Horse Cars.—Testimony of defendant's president as to the degree of care exercised, before the injury complained of in the selection of drivers of its horse cars, was not material to the question whether the driver of the car in question was negligent at the time of the accident. So held in *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706.

Fall into Ditch—Care in Selecting Watchman—Reputation of Watchman.—In an action against a railroad for personal injuries, caused by falling into a ditch dug by it in a public highway, its liability depends wholly on its having caused or continued the nuisance, and plaintiffs having sustained the injury without contributory negligence on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character or reputation as a watchman, at the time of his employment, is immaterial, and properly excluded. So held in *South & North Ala. R. Co. v. Chappell*, 61 Ala. 527.

Failure to Deliver Money—Moral Character of Express Company's Employees.—In an action against an express company for failure to deliver money consigned to it, evidence of the good moral character of its employees was inadmissible. So held in *Bank of Irwin v. American Express Co. (Iowa)*, 15 R. R. R. 245, 38 Am. & Eng. R. Cas., N. S., 245.

2. Limitations of and Exceptions to General Rule.

1. Master Charged with Negligence in Employing or Retaining Servant.

Where a master is charged with negligence in employing or retaining an incompetent or careless servant, he may show that such employee has a good reputation with respect to the essential qualification.

Thus in *Montgomery & West Point R. Co. v. Edmonds*, 41 Ala. 667, it is said in the opinion: "As a general rule, the character of an agent or servant, for caution and skill in the business in which he is employed, can not be proved by the principal, unless it has been assailed by the adverse party. For it makes no difference, how skillful or expert the servant may be, if any loss has occurred from his negligence, for which his principal is responsible. It neither makes out a defense, nor mitigates the damages, to prove the skill of such servant. But, when a party deems it necessary to make proof of the unskillfulness of the servants of the principal in order to establish the cause of action, then it is permissible for the defendant to prove the character of such servant for skill in the business in which the damage is alleged to have been inflicted."

Fire Set by Locomotive—Reputation of Trainmen as for Carefulness and Skill.—And in an action for the destruction of property by fire, though alleged negligence in managing a locomotive, evidence is admissible to show that defendant's trainmen were careful and competent men, in connection with other facts, to enable the jury to determine whether, on the occasion in question, they were managing the engine carefully and skillfully. So held in *Kenney v. Hannibal & St. Jo. R. Co.*, 70 Mo. 243.

Fire Set by Locomotive through Negligence—Rebuttal—Engineer and Fireman's Carefulness and Skill.—So, in an action for the destruc-

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tion of property by fire started by one of defendant's locomotives through alleged negligence, after plaintiff has introduced evidence tending to support the allegations of the petition, defendant may be properly allowed to introduce testimony tending to show that the engineer and fireman of such locomotive were competent and careful, and that the engine was of a new and approved make, and properly equipped and inspected. So held in *Patton v. St. Louis & San Francisco Ry. Co.*, 87 Mo. 117.

Fire from Locomotive—Competency of Engineer.—So, in an action for the destruction of property by fire from a locomotive, testimony of a member of the board of examiners as to the competency of the engineer in charge of the locomotive was admissible, upon the question of the railroad's negligence. So held in *Flynn v. Manhattan Ry. Co.* (N. W. City Com. Pls.), 20 N. Y. Supp. 652.

Horse Killed through Negligence of Defendant's Agent—Skill of Agent—Rebuttal.—And in an action for the value of a mare, killed through the alleged negligence of defendant's agent, who had charge of the business in which the injury occurred; where the latter's skill was put in issue, and plaintiff had offered evidence to prove his want of skill, it was error to refuse defendant the opportunity to prove the agent's skill, notwithstanding such skill, if proved, would be no defense, if he was in fact negligent in the act complained of. So held in *Peterson v. Adamson*, 67 Iowa 739, 21 N. W. 701.

Reputation of Employee for Competency and Carefulness.—Thus evidence of the general reputation of a servant for competency and carefulness at the time and place of employment is admissible as tending to disprove alleged negligence in employing him. So held in *Illinois Cent. R. Co. v. Morrissey*, 45 Ill. App. 127.

Accident at Crossing—Flagman's Carefulness and Sobriety—Rebuttal.—And in an action for injury sustained at a railroad crossing, where plaintiff has attempted to prove that the flagman at the crossing was careless and intemperate, the defendant railroad is entitled to show that he was careful, attentive and temperate. So held in *Gahagan v. Boston & Lowell R. Co.*, 83 Mass. 187.

Fire Communicated from Mill—Reputation of Erector of Burner for Skill.—So in an action for the destruction of property by fire communicated from defendant's mill, it was competent, as tending to show the degree of care used by defendant to prevent such accidents, to ask one of the members of defendant corporation, as to the reputation of the man who had erected their burner and its spark arrester as to competency in his line of business. So held in *Day v. H. C. Akeley Lumber Co.*, 54 Minn. 522, 56 N. W. 243.

Injuries to Passenger—Failure to Eject Another Passenger—Conductor's Reputation.—And in an action for personal injuries inflicted by one passenger to another, based on alleged negligence in failing to put the passenger doing the injury off the train, it was error to strike out part of the answer, alleging the reputation of the conductor for courage and efficiency, and exclude evidence in regard to it. So held in *Louisville & N. R. Co. v. McEwan* (Ky.), 31 S. W. 465.

Carefulness and Skill of Driver of Vehicle—Where Utmost Care Required.—But it has been held that the rule allowing the admission of evidence of the careful habits and competent skill of a driver of a vehicle is limited to cases where the utmost care and diligence are required, and where, therefore, a prima facie case is made out, or a presumption of negligence is created, by proof of the happening of the accident. So held in *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207. See also, *Boyce v. California Stage Co.*, 25 Cal. 468; *Ficken v. Jones*, 28 Cal. 618.

E. WHETHER ADMISSIBLE FOR PURPOSE OF SHOWING CONTRIBUTORY NEGLIGENCE.

As a general rule, evidence of plaintiff's character or reputation

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for incompetency or carelessness can not be introduced for the purpose of charging him with contributory negligence.

United States.—*Louisville & N. R. Co. v. McClish* (C. C. A.), 3 R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942, 115 Fed. 268.

Alabama.—*Glass v. Memphis & Charleston R. Co.*, 94 Ala. 581, 10 So. 215.

Georgia.—*Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763.

Iowa.—*Dalton v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460, 86 N. W. 272.

Kentucky.—*Louisville & N. R. Co. v. Berry*, 88 Ky. 222, 10 S. W. 472.

Maine.—*Dunham v. Rockliff*, 71 Me. 345.

Michigan.—*Hill v. Snyder*, 44 Mich. 318, 6 N. W. 674; *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130.

Missouri.—*Lane v. Missouri Pac. Ry. Co.*, 132 Mo. 4, 33 S. W. 1128.

New York.—*Eppendorf v. Brooklyn City & Newton R. Co.*, 69 N. Y. 195.

Pennsylvania.—*Baker v. Irish*, 172 Pa. St. 528, 33 Atl. 558.

Rhode Island.—*Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 33 Atl. 732.

Texas.—*Missouri, K. & T. Ry. Co. v. Johnson* (Tex.), 12 Am. & Eng. R. Cas., N. S., 824.

Wisconsin.—*Brennan v. Town of Friendship*, 67 Wis. 223, 29 N. W. 902; *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586.

Habits as to Walking on or Crossing Railroad Tracks.—In an action for personal injuries sustained by a person while walking on a railroad track, his habits as to walking on or crossing railroad tracks, whether careful or careless, are not admissible in evidence. So held in *Glass v. Memphis & Charleston R. Co.*, 94 Ala. 581, 10 So. 215.

Plaintiff Habitually Careless.—In an action for injury to defendants' employee, sustained while he was at work on their dock, from an alleged defect in it, evidence was not admissible to show that plaintiff was an habitually careless man. So held in *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586.

Injury to Engineer—Habit of Sleeping while on Duty.—In an action for injuries to an engineer, caused by a collision, claimed to have resulted from his failure to keep a lookout, it was held that evidence to show that plaintiff was in the habit of going to sleep while running his engine was inadmissible. *Missouri, K. & T. Ry. Co. v. Johnson* (Tex.), 12 Am. & Eng. R. Cas., N. S., 824.

Defect in Highway—Plaintiff a Reckless Rider.—In an action for injuries to plaintiff from a defect in the highway, while he was riding on horse-back, evidence was inadmissible to show that he was an habitually reckless or careless rider. So held in *Brennan v. Town of Friendship*, 67 Wis. 223, 29 N. W. 902.

Collision between Locomotive and Another Vehicle—General Reputation as Driver.—In an action for personal injuries, sustained by plaintiff while riding in a vehicle by reason of a collision between it and a locomotive, the carelessness of the driver of the vehicle can not be proved by evidence as to his general reputation as a driver, as evidence on such point must come from those who can testify to the fact of their own knowledge. So held in *Baldwin v. Western R. Corp.*, 70 Mass. 333.

Vehicle Colliding with Obstruction in Highway—Plaintiff's Usual Method of Driving.—In an action for injuries caused by plaintiff's vehicle, which he was driving, colliding with an obstruction in a highway, evidence is inadmissible to show plaintiff's usual manner and method of driving, such evidence being incompetent to prove his negligence at the time of the accident. So held in *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130.

Speed of Vehicle—Plaintiff Ordinarily a Rapid Driver.—In an action against a city for personal injuries, where there is direct testimony

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as to the rate of speed at which plaintiff was driving when he ran into a ditch, evidence that he was ordinarily a rapid driver is inadmissible. So held in *City of Salem v. Webster*, 192 Ill. 369.

Vehicle Colliding with Obstruction in Highway—Whether Plaintiff a Drinking Man.—In an action for injuries caused by plaintiff's vehicle, which he was driving, colliding with an obstruction in a highway, evidence is inadmissible to show that he was a drinking man, the only material question, in this connection, being his condition as to sobriety at the time of the accident. So held in *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130.

Habit of Jumping from Elevator.—In an action for personal injuries, evidence that plaintiff had made a practice of jumping from the elevator in question was not competent as tending to show that he was similarly negligent at the time of the accident. So held in *Baker v. Irish*, 172 Pa. St. 528, 33 Atl. 558.

Passenger's Habit of Jumping on Moving Cars.—In an action for an injury to a passenger, sustained after the driver of the car had applied the brake in order to allow him to board, and the passenger was trying to board the slowly moving car, by reason of the conduct of the driver, who was looking at him, in starting the car with a jerk, without any signal or notice, evidence was not admissible to show that plaintiff was in the habit of jumping on moving cars, as the sole question to be determined, so far as related to plaintiff's alleged contributory negligence, was the character of his acts under the circumstances existing at the time. So held in *Eppendorf v. Brooklyn City & Newton R. Co.*, 69 N. Y. 195.

Character for Prudence or Recklessness in Conducting Same Business.—On the issue whether, in a particular instance, a person used due care for his own safety, evidence of his character for prudence or recklessness in the conduct of such business is inadmissible, either for or against him. So held in *Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763.

Fall on Icy Street—Intemperate Habits.—In an action for injuries sustained by plaintiff from falling on an icy street, evidence was inadmissible to prove his intemperate habits, for, if plaintiff was sober at the time of the accident, his habits were immaterial, and intoxication at the time could not be inferred from proof of mere intemperate habits. So held in *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 33 Atl. 732.

Personal Injuries—Plaintiff's Habit of Intoxication.—In an action for personal injuries, alleged to have resulted from intoxication on the part of the plaintiff, it was error to admit evidence to show that the latter had been in the habit of getting drunk prior to the accident. So held in *Kingston v. Ft. Wayne & E. Ry. Co.* (Mich.), 9 Am. & Eng. R. Cas., N. S., 259.

Defective Sidewalk—Plaintiff's Prior Habit of Using Intoxicating Liquors.—In an action for personal injuries from a defective sidewalk, evidence that plaintiff had been in the habit of using intoxicating liquors prior to the injury, would not be competent to prove that he was intoxicated at the time he was injured. So held in *Hubbard v. Town of Mason City*, 60 Iowa 400, 14 N. W. 772.

That Person Sometimes Became Intoxicated.—Where the question is whether a person was drunk at a certain time, evidence is not admissible to show that he sometimes became intoxicated. So held in *Senecal v. Thousand Island Steamboat Co.*, 29 N. Y. Supp. 884, 79 Hun 574.

Plaintiff's Habits as to Running Horses, and Intoxication—Accident from Another Cause.—Where it is not claimed that plaintiff, at the time he was injured, was either running horses or intoxicated, it is not admissible on cross examination, in an action for such injuries, to ask him as to his habits with respect to running horses on the

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highway, or of being intoxicated while driving. So held in *Hill v. Snyder*, 44 Mich. 318, 6 N. W. 674.

Injury to Boy Assisting Passenger from Defective Car Platform—Boy's Habit of Jumping on Moving Trains.—In an action for injury to a boy, who was on a train for the purpose of assisting a passenger to board, alleged to have resulted from a defective car platform, evidence was not admissible to prove that plaintiff was in the habit of jumping on moving trains at that place, and had been warned of the danger, he having testified that the injury was caused by his stepping on a rotten plank in the platform, which statement was corroborated by convincing circumstances, either for the purpose of impeaching plaintiff or to show that the injury was caused by his negligence. So held in *Louisville & N. R. Co. v. Berry*, 88 Ky. 222, 10 S. W. 472.

Fall into Hole in Sidewalk—Repeated Drunkenness before and after Accident.—But in an action against a city for personal injuries resulting from a fall into a hole in a sidewalk, it being in issue whether plaintiff was drunk at the time of the accident, evidence is admissible to show repeated drunkenness on his part for some years before the accident and afterwards. So held in *Enright v. Atlanta*, 78 Ga. 288.

Fall upon Sidewalk—Plaintiff's Habit of Getting Drunk.—And in an action for injuries from a fall upon a defective sidewalk, it was not error to allow plaintiff to be asked, on cross examination, whether he was not in the habit of getting drunk, for as there was evidence that he was intoxicated at the time of the accident, proof of such habit would tend to corroborate the testimony that he was drunk at the time, which had been contradicted by himself and was afterwards disputed by another witness. So held in *McCracken v. Village of Markesan*, 76 Wis. 499, 4 N. W. 323.

F. WHETHER PLAINTIFF CAN SHOW HIS OWN HABITS OR CHARACTER.

According to the weight of authority, plaintiff can not introduce evidence of his habitual prudence and carefulness to overcome a specific imputation of contributory negligence.

Alabama.—*Glass v. Memphis & Charleston R. Co.*, 94 Ala. 581, 10 So. 215.

Georgia.—*Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. W. 763.

Illinois.—*Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 54.

Kansas.—*Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677.

Kentucky.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'x* (Ky.), 8 R. R. R. 77, 31 Am. & Eng. R. Cas., N. S., 77.

Massachusetts.—*Carr v. West End Street Ry.*, 163 Mass. 360, 40 N. E. 185; *McDonald v. Savoy*, 110 Mass. 49.

New York.—*Wooster v. Broadway & Seventh Ave. R. Co.*, 72 Hun 197, 25 N. Y. Supr. Ct. 378.

Texas.—*Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358.

Utah.—*Wells v. Denver & Rio Grande W. Ry. Co.*, 7 Utah 482, 27 Pac. 688.

Crossing Accident—Plaintiff's Habit of Looking for Trains.—In an action for personal injuries sustained by plaintiff by reason of a collision with a train at a crossing, it was error to allow plaintiff to testify that he was in the habit of looking for approaching trains, he having testified that he looked for the one by which he was struck. So held in *Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358.

Fall on Street Crossing—Plaintiff's General Habit of Carefulness.—In an action for personal injuries from a fall caused by an alleged defect in a street crossing, evidence of plaintiff's general habits of carefulness is inadmissible to show that she was free from contribu-

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tory negligence at the time of the accident complained of. So held in *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677.

Injury to Horse from Defect in Highway—Plaintiff's Habitual Care and Skill in Driving.—In an action for injuries to plaintiff's horse, while he was driving it, from a defect in a highway, evidence that plaintiff was habitually careful and skillful in driving was not admissible as tending to show that he was in the exercise of due care when the accident occurred. So held in *McDonald v. Savoy*, 110 Mass. 49.

Collision between Street Car and Team—Habits of Plaintiff as to Sobriety—Rebutting Direct, or Immaterial, Evidence.—In an action for injuries to plaintiff and his team from a collision with a street car, evidence as to his habits is not admissible to rebut evidence that he was intoxicated at the time of the accident, nor to meet testimony, brought out by plaintiff on cross examination of a witness for defendant, that plaintiff had been seen intoxicated several times before the accident, the latter testimony being immaterial. So held in *Carr v. West End Street Ry. Co.*, 163 Mass. 360, 40 N. E. 185.

Plaintiff's Habits as to Sobriety or Carefulness—Direct Evidence.—Where there is positive evidence as to the care exercised by the injured party, it is error to admit evidence in his behalf in relation to his habits as to sobriety or carefulness. So held in *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 54.

Obstructed Street Crossing—Skill of Plaintiff as a Driver Admissible in Rebuttal.—In *Stafford v. City of Oskaloosa*, 64 Iowa 251, 20 N. W. 174, an action for personal injuries resulting from an obstructed street crossing, defendant introduced evidence tending to show that the driver of the vehicle in which plaintiff was riding was habitually reckless in driving; that it was his common custom to drive very fast, and to go over the street crossings without slacking the speed of his horse; and that he had met with accidents similar to the one in question on other occasions, and that these accidents resulted from his reckless manner of driving. In rebuttal, plaintiff offered evidence tending to prove that he was a skillful driver. It was held that the rule that after defendant has introduced evidence upon a point of doubtful or slight materiality, it could not complain that plaintiff was allowed to introduce rebutting evidence on the same question was applicable.

Crossing Accident—Boy's Habit of Crawling under Cars—Rebuttal.—In a crossing accident case, where defendant attempted to show that the injured boy was in the habit of crawling under cars, it was proper to allow him to testify in rebuttal that he was not addicted to such habit. So held in *Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.), 42 S. W. 584.

Care Habitually Exercised by Insane Person.—In an action for personal injuries, where plaintiff is insane, and unable to be present and testify, evidence as to her habits is admissible on the issue whether she was probably exercising ordinary care for her own safety at the time of the accident. So held in *City of Chicago v. Doolan*, 99 Ill. App. 143.

Ejection of Passenger—Plaintiff's Habit as to Use of Profane Language.—In an action for the ejection of a passenger from a train, evidence was offered tending to show that before his ejection he used obscene and profane language. It was held that the testimony of two witnesses for plaintiff, one of whom testified "that he had never heard him use half a dozen oaths in his life," and the other that "he never heard him use obscene language in public, but had heard him make use of an oath sometimes, but not frequently," was inadmissible, as such evidence would present a mere collateral issue. So held in *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54.

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G. WHETHER PLAINTIFF MAY SHOW HABITS OR CHARACTER OF HIS DECEDENT.

1. Where No Evidence as to Cause of Accident.

a. General Rule.—In an action for wrongful death, where there is no evidence showing either the existence or nonexistence of contributory negligence on the part of deceased, it is generally held that evidence of his prior habits as to care, prudence and sobriety is admissible, as tending to prove that he was not guilty of contributory negligence on the occasion in question.

California.—*Gay v. Winter*, 34 Cal. 153.

Connecticut.—*Morris v. East Haven*, 41 Conn. 252.

Georgia.—*Atlanta & S. W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas., 211, 85 Ga. 517, 11 S. E. 776.

Illinois.—*Chicago, St. P. & K. C. R. Co. v. Anderson*, 47 Ill. App. 91; *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas., 261, 108 Ill. 113; *Cleveland, C., C., etc., Ry. Co. v. Moss*, 89 Ill. App. 1; *Cox v. Chicago & N. W. Ry. Co.*, 92 Ill. App. 15; *Gardner v. Chicago, R. I. & P. Ry. Co.*, 17 Ill. App. 262; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Illinois Cent. R. Co. v. Pummill*, 58 Ill. App. 83; *McNulta v. Lockbridge*, 32 Ill. App. 86; *Toledo, St. Louis & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089.

Indiana.—*Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

Maine.—*Chase v. Maine C. R. Co.*, 77 Me. 62.

Maryland.—*Northern Cent. R. Co. v. Geis*, 31 Md. 357; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 504.

Massachusetts.—*McDonald v. Savoy*, 110 Mass. 49.

New Hampshire.—*Davis v. Concord & M. R. R.*, 19 Am. & Eng. R. Cas., N. S., 68, 68 N. H. 248, 44 Atl. 388; *Smith v. Boston & M. R. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 320.

New York.—*Johnson v. Hudson River R. Co.*, 20 N. Y. 65.

Pennsylvania.—*Cleveland & P. R. Co. v. Rowan*, 66 Pa. St. 393; *Lehigh Valley R. R. Co. v. Hall*, 61 Pa. St. 361; *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. St. 387.

Texas.—*Houston & T. C. R. Co. v. Waller*, 8 Am. & Eng. R. Cas. 431, 56 Tex. 331.

In an action for death from negligence, where no one saw the accident and the cause and manner of death is established by circumstantial evidence, evidence that deceased was habitually prudent, cautious and temperate is admissible, on the issue of contributory negligence. So held in *Illinois Cent. R. Co. v. Pummill*, 58 Ill. App. 83.

Whether Deceased Was Habitually Careful.—In an action for death from negligence, where there is no living witness of the accident, evidence as to whether deceased was habitually careful or otherwise is admissible. So held in *McNulta v. Lockbridge*, 32 Ill. App. 86.

Crossing Accident—Deceased's Habit as to Carefulness, for Three Years, in Driving over the Crossing.—In an action for the death of a person killed by a train while driving over a highway crossing, evidence was admissible to show that it had been his habit for three years, while driving over such crossing, to drive slowly, and watch for trains. So held in *Davis v. Concord & M. R. R.*, 19 Am. & Eng. R. Cas., N. S., 68, 68 N. H. 248, 44 Atl. 388.

In this case it is said in the opinion: "It has repeatedly been held in this state that such evidence is competent upon the ground that a person is more likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing it or not doing it" (citing *State v. Manchester & L. R. R.*, 52 N. H. 528, 549, 550; *Hall v. Brown*, 58 N. H. 93, 96, 98; *State v. Boston & M. R. R.*, 58 N. H. 410, 412; *Plummer v. Ossipee*, 59 N. H. 55, 59; *Nutter v.*

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Boston & M. R. R., 60 N. H. 483, 485; *Parkinson v. Nashua & L. R. Co.*, 61 N. H. 416; *Lyman v. Boston & M. R. R.*, 66 N. H. 200, 45 Am. & Eng. R. Cas. 163, 20 Atl. 976).

Crossing Accident—Deceased's Uniform Habits as to Carefulness at the Crossing.—In an action for the death of a traveler by a train at a crossing, evidence of deceased's uniform habit of slackening the speed of his horse to a walk at the crossing and looking and listening for the approach of a train before attempting to pass over tracks, tended to show that he did so before making the attempt to cross which resulted in his death, and was substantial evidence of his exercise of care on that occasion. So held in *Smith v. Boston & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320.

Explosion of Boiler—Death of Engineer—Evidence That Deceased Was Competent and Careful.—Where an engineer and fireman are killed by the explosion of the boiler of their locomotive, and there is no direct testimony as to the manner in which the locomotive was being managed at the time, evidence is admissible, in an action for the death of the engineer to show that he was a competent and careful engineer, for the purpose of rebutting any presumption of a want of skill on his part. So held in *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089.

Exercise of Ordinary Care Inferred from Habits of Deceased or Injured Person, Where Proof of Defendant's Negligence.—Where the negligence of defendant is affirmatively proved, and there is no proof of the conduct of the deceased or injured person, the jury are at liberty to infer ordinary care and diligence on his part, taking into consideration his character, and habits, as proved, and the natural instinct of self-preservation. So held in *Gay v. Winter*, 34 Cal. 153.

Death of Brakeman—Habits as to Prudence and Sobriety.—In an action for the death of a brakeman, killed while coupling cars, where there was no eyewitness of the accident, evidence of his prior habits as to care, prudence and sobriety is admissible, as tending to prove that he was prudent, cautious and sober at the time he was killed. So held in *Chicago, R. I. & P. Ry. Co. v. Clarke*, 108 Ill. 113.

Person Killed by Locomotive—Habits of Deceased as to Sobriety and Industry.—In an action for the death of a person run over by a locomotive, where no witness saw the accident, evidence is admissible to show that deceased was a sober, industrious man, as tending to show that he was in the exercise of due care at the time of the accident. So held in *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

Crossing Accident—Deceased's Reputation for Sobriety.—In an action against a railroad company for killing plaintiff's intestate at a crossing, evidence of intestate's general reputation for sobriety was inadmissible. So held in *Chesapeake & O. Ry. Co. v. Riddle's Adm'x* (Ky.), 8 R. R. R. 77, 31 Am. & Eng. R. Cas., N. S., 77. In this case it is said in the opinion: "This evidence would not meet or elucidate the question as to whether or not decedent was sober at the time he was killed."

Death of Night Watchman—Sobriety of Deceased.—In an action for the death of a night watchman, found dead under an unrailed bridge connecting two buildings, which he was accustomed to cross in the performance of his duties, evidence for plaintiff was admissible to show what kind of a man he was in respect to sobriety, and his bodily and mental peculiarities. So held in *Overman Wheel Co. v. Griffin*, 67 Fed. 659.

b. Minority Doctrine.—But there are authorities holding that such evidence is not admissible to negative contributory negligence, even where there is no direct evidence as to the conduct of deceased. *Wells v. Denver & R. G. W. Ry. Co.*, 7 Utah 482, 27 Pac. 688; *Elliott v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas., 62, 5 Dak. 523,

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41 N. W. 758; *Scott v. Hall*, 16 Me. 323; *Chase v. Maine Cent. R. R. Co.*, 19 Am. & Eng. R. Cas. 356, 77 Me. 62.

Where the issue is the conduct of deceased at the time of the accident, it is not admissible to show that his character was that of a prudent and cautious man. So held in *Atlantic & W. P. R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776.

Accident at Crossing—Habits of Deceased as to Carefulness—Absence of Direct Evidence.—In *Chase v. Railroad*, 77 Me. 62, an action for personal injuries received by a collision at a railroad crossing, evidence will not be received to show the general character and habits of the traveler for carefulness, as bearing upon the question of due care on his part, though his injuries occasioned death before he could tell how the accident happened, and no one saw him at the time of the collision. In this case it is said in the opinion: "The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury and very soon afterwards died. He never was conscious enough after the injury to tell how the accident happened; no one was with him at the time; no one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this state. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good."

Defect in Highway—Reputation of Driver for Carefulness.—In *Morris v. Town of East Haven*, 41 Conn. 253, an action for injury to plaintiff's intestate from a defective highway, plaintiff, to prove that deceased was driving with ordinary care when the accident happened, called several witnesses, who, having testified that they had often seen him drive, were asked whether he was a careful driver. It was held that the inquiry was inadmissible, as calling for a mere opinion, and as irrelevant.

2. Where Evidence as to Cause of Accident.

But such evidence is irrelevant and inadmissible, where the testimony of an eyewitness to the accident is available, or there is other evidence showing the cause of the accident. *Morris v. East Haven*, 41 Conn. 252; *Elliott v. Chicago M. & St. Ry. Co.*, 5 Dak. 523, 41 N. W. 758; *Atlantic & W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. 776; *Chicago, St. P. & K. C. R. Co. v. Anderson*, 47 Ill. App. 91; *Chicago, R. I. & P. R. Co. v. Clarke*, 15 Am. & Eng. R. Cas. 261, 108 Ill. 113; *Gardner v. Chicago, I. I. & P. R. Co.*, 17 Ill. App. 262; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *McNulta v. Lockridge*, 31 Ill. App. 86; *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089; *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 565, 61 N. W. 1059; *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 19 Am. & Eng. R. Cas. 356; *Philadelphia, V. & B. R. Co. v. Stebbing*, 61 Md. 504; *McDonald v. Savory*, 110 Mass. 49; *Guggenheim v. Lake Shore & Mich. So. Ry.*, 66 Mich. 155, 33 N. W. 61; *Pennsylvania Co. v. Trainer*, 12 Ohio Cir. Ct. 66; *Houston & T. C. R. Co. v. Waller*, 8 Am. & Eng. R. Cas., 431, 56 Tex. 331.

In an action for the death of a person killed by a train at crossing, evidence of the habits of deceased, introduced to raise a presumption of the exercise of due care by him, is admissible for that purpose only when no one was present or knew how the accident occurred. So held in *Gardner v. Chicago, R. I. & P. Ry. Co.*, 17 Ill. App. 262.

In an action for wrongful death, on the issue of deceased's contributory negligence, where there were eyewitnesses of the accident, evidence to show that he was an habitually careful man is irrelevant

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and inadmissible. So held in *Elliott v. Chicago M. & St. P. Ry. Co.*, 5 Dak. 523, 41 N. W. 758.

Death of Brakeman—Habits of Deceased.—In an action for the death of a brakeman, killed while coupling cars, if there are witnesses who saw the transaction, evidence of his prior habits as to care, prudence and sobriety is irrelevant and inadmissible. So held in *Chicago, R. I. & P. Ry. Co. v. Clarke*, 108 Ill. 113.

Death of Employee—Carefulness of Deceased.—In an action for the death of an employee killed by a locomotive, general testimony that he was always careful and on the lookout for danger is inadmissible, on the question of contributory negligence, where there are witnesses who saw how the accident happened. So held in *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 565, 61 N. W. 1059.

Crossing Accident—Deceased's Habits as to Care or Negligence—Eyewitnesses.—In an action for the death of a person, killed by a train at a crossing, while he was driving across the tracks, evidence was inadmissible to show deceased's habits of care or want of care in crossing at the same place at other times, there being eyewitnesses of the accident, able to give direct testimony as the care exercised by him on the occasion in question. So held in *Guggenheim v. Lake Shore & Mich. So. Ry.*, 66 Mich. 155, 33 N. W. 61.

Habits of Deceased as to Sobriety—Direct Evidence.—Evidence as to whether deceased was or was not habitually temperate is inadmissible, in an action for his death, where the fact whether he was under the influence of liquor at the time of the accident could be proved by witnesses who saw him just before that occasion. So held in *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633.

Driver Killed by Train—Habitual Care in Managing Horses.—In an action for the death of a person, killed by a train while driving across railroad tracks, evidence is inadmissible, in chief, to show that he was an unusually careful man in the care and management of horses. So held in *Pennsylvania Co. v. Trainer*, 12 Ohio Cir. Ct. 66. In this case there was direct testimony as to how the accident happened.

Yard Master Killed—Whether He Was Habitually Careful.—On the question whether a yard master, who was killed while overseeing the switching of cars, was guilty of contributory negligence, evidence, wholly of a general nature, that he was always prudent and on the lookout for dangers, is inadmissible. So held in *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 565, 61 N. W. 1059. But here a witness had seen deceased in the act of stepping in front of the engine.

Contributory Negligence—Carefulness and Skill of Deceased.—In an action for the death of a brakeman from the alleged defective condition of the coupling and drawhead of a car, evidence as to the good reputation of deceased as a careful and skillful railroad man was not competent as bearing on the question of his contributory negligence. So held in *Wells v. Denver & Rio Grande W. Ry. Co.*, 7 Utah 482, 27 Pac. 688. In this case there was circumstantial evidence as to the cause of the accident.

H. DEFENDANT CAN NOT SHOW HABITS OR CHARACTER OF PLAINTIFF'S DECEDENT.

Even in an action to recover for the negligent killing of plaintiff's decedent, although there was no eyewitnesses to the accident, defendant cannot show that deceased was unskillful or habitually careless, for the purpose of creating an inference that his incompetency or carelessness contributed to his death. *Louisville & N. R. Co. v. McClish* (C. C. A.), 3 R. R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942, 115 Fed. 268; *Elliott v. Chicago, M. & S. P. R. Co.* (Dak.), 3 L. R. A. 363; *Guggenheim v. Lake Shore & Mich. So. Ry.*, 66 Mich. 155, 33 N. W. 61.

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Habit of Deceased to Board Moving Trains.—In *Louisville & N. R. Co. v. McClish* (C. C. A.), 3 R. R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942, 115 Fed. 268, it is said in the opinion: "The argument is, that proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of deceased at other times."

Accident at Crossing—Instances of Deceased's Being Found Asleep in Buggy.—Where, in an action for the killing of a person at a railroad crossing, it was claimed that he was asleep in his buggy when he drove on the track, it was error to admit evidence of isolated instances of his being found asleep in his buggy. So held in *Dalton v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460, 86 N. W. 272.

Habit of Deceased to Jump on Moving Trains.—In an action against a railroad company to recover for the death of a person alleged to have been struck and killed by a train, though there was no eyewitness to the accident, it is not competent for defendant to show the habit of deceased to jump on moving trains near the place where his body was found, for the purpose of raising an inference that his death resulted from such attempt; but the testimony should be confined to his acts on the particular occasion in issue capable of being directly or circumstantially proved. So held in *Louisville & N. R. Co. v. McClish* (C. C. A.), 3 R. R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942, 115 Fed. 268.

Crossing Accident—Deceased's Habit of Intoxication.—In an action for the death of a person, killed by a train at a crossing, evidence is not admissible, for the purpose of proving contributory negligence, to show that he was given to the habit of intoxication. So held in *Lane v. Missouri Pac. Ry. Co.*, 132 Mo. 4, 33 S. W. 645, 1128.

Deceased's Habit of Jumping On and Off Cars—Death from Another Cause.—Where it appeared that deceased was not killed while jumping on or off cars, evidence of his previous habit of doing so at the crossing where he was killed was not admissible. So held in *Georgia, Mid. & G. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580.

Boy Struck by Train While on Ground—His Habit of Jumping on Trains.—In an action for the death of an errand boy, struck by a train at a crossing, while on the ground, to show that deceased was in the habit of jumping on trains was inadmissible, as having the effect of raising a collateral and immaterial issue. So held in *Peoria & Pekin U. Ry. Co. v. Clayberg*, 107 Ill. 644.

Collision—Death of Engineer—Deceased's Habit of Running Trains at Excessive Speed—Knowledge of Only Two or Three Instances.—In *East Tenn. Va. & Ga. Ry. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, one of the main issues was whether or not the engineer for whose death the action was brought was guilty of negligence in bringing about the collision which resulted in his death; but it was held that it was proper to refuse to allow defendant to prove that he "was habitually reckless in running freight trains at excessive speed, and running too fast over switches," the witness's knowledge not extending to more than two or three instances.

Note

I. HABITS OR CHARACTER OF DOMESTIC ANIMALS INFLICTING OR CAUSING INJURIES.

Stock Attacked by Dogs—Reputation of Dogs.—In an action for injuries to stock, inflicted by defendant's dogs, evidence was admissible to prove that the dogs were generally reported in the neighborhood to be vicious and destructive, for the purpose of showing that defendant was chargeable with notice of their viciousness. So held in *Murray v. Young*, 75 Ky. 337.

Injury from Bite of Dog—Peaceable Disposition of Dog.—In an action for injuries from the bite of a dog, where it was shown that the owner allowed it to run at large at the time of the accident to plaintiff, although he knew that it had bitten other persons, evidence was not admissible to show that the animal was generally of a peaceable disposition, as such fact would be no defense. So held in *Buckley v. Leonard*, 4 Denio (N. Y.), 500. See also, *Linck v. Scheffel*, 32 Ill. App. 17.

Injury to Meat—Vicious Character and Roving Propensities of Dog.—In an action for injury to meat committed by a dog, it was not error to receive evidence to show the vicious character and roving propensities of the animal, as such evidence might have some bearing on the probability as to the cause of the injury, and the liability of defendant. So held in *Cheney v. Russell*, 44 Mich. 620, 70 N. W. 234.

Horse Attacked by Dog—Character of Dog—Traits Not Exactly Similar to Those Alleged.—In an action for personal injuries resulting from the fact that a horse driven by plaintiff was attacked in a public highway by defendant's dog, and ran away, where it was alleged in the petition that the dog was in the habit of attacking, biting, chasing and frightening teams, evidence that the dog was habitually frightening teams by chasing, barking, biting, or in any other way, was admissible, although the traits proven were not just the same as those averred in the petition; and the right of plaintiff to recover was not affected by the fact that the evidence failed to show that the dog had before committed the exact kind of act of which plaintiff complained. So held in *Cameron v. Bryan*, 89 Iowa 214, 56 N. W. 434.

Plaintiff's Knowledge of Reputation of Bull—Contributory Negligence in Striking It.—In an action for injuries to plaintiff, inflicted by defendant's bull while running at large, evidence as to the character and general reputation of the animal as being vicious, and as to what had been told to plaintiff on the subject, was admissible as tending to show whether plaintiff was guilty of contributory negligence in striking the bull with his cane. So held in *Meier v. Shrunk*, 79 Iowa 17, 44 N. W. 209.

Injury to Street Railway Passenger—Reputation of Car Horse.—In an action for injury to a street railway passenger, evidence of the general reputation of one of the car horses, among the drivers and other employees of defendant, as unsafe and unreliable, was admissible as tending to show negligence in providing such an animal, and in using it after the company was chargeable with notice of its disposition. So held in *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. 1000.

Disposition of Defendant's Team to Pass Other Teams at Great Speed.—In an action for the negligent or reckless driving of defendant's team past that of plaintiff, evidence is admissible to show the disposition of defendant's team as to racing, that he had trained it to pass other teams at great speed, and that it had acted in that way both before and shortly after the accident. So held in *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922. In this case it is said in the opinion: "The case is unlike the attempt to prove an individual to be habitually careless or reckless, as in *Brennan v. Friendship*, ante, p. 223; *Whitney v. Gross*, 140 Mass. 232, 5 N. E. 619."

Note

Collision with Runaway Team, Whose Driver Had Been Thrown from Vehicle by Reason of Defect in Road—Team's Habit of Running Away.—In an action for injuries caused by a collision with a runaway team, whose driver had been thrown from his vehicle in consequences of a bad place in the road, evidence was not admissible to show that such team had the habit of running away, as the question whether the animal had such habit was immaterial, if the danger of injury to plaintiff was enhanced by the accident that occurred in consequence of the defect in the highway. So held in *Cheney v. Town of Ryegate*, 55 Vt. 499.

Reputation of Horse among Liverystable Employees.—In an action for injuries from the alleged unmanageableness of a horse plaintiff was driving, evidence of the reputation of the horse among those employed in the stable of the defendant liveryman, wherein the animal was kept, is incompetent for the purpose of proving its disposition, but is admissible to show that defendant was chargeable with notice of the animal's disposition. So held in *Short v. Bohle*, 64 Mo. App. 242.

Frightening Team—Character of Horse—Prior Use—Harmless Error.—The admission of testimony of prior and subsequent use of a horse frightened by the blowing of a steam whistle, and that he was always gentle at such times, even though it was inadmissible, was harmless error. So held in *Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

J. WHETHER ADMISSIBLE AS BEARING ON QUESTION OF MEASURE OF DAMAGES.

We have collected a few authorities on this question, though it may be considered somewhat foreign to the purpose of this note.

Deceased's Habits of Industry.—In an action for wrongful death, evidence of deceased's habits of industry was competent on the question of the measure of damages. So held in *Shaber v. St. Paul M. & M. Ry. Co.*, 28 Minn. 103, 9 N. W. 575.

In an action for wrongful death, evidence is admissible, for the purpose of showing the expectation of pecuniary benefit of the mother of deceased, to show his business ability and his habits of industry. So held in *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575.

Deceased's Habits in Regard to His Family Life.—In an action for wrongful death, where the jury was instructed that the word "pecuniary," as used in the statute prescribing the damages recoverable in an action for death, excluded injuries to the affections, and also losses from the deprivation of society and companionship of relatives, but that infant children might sustain a loss from the death of their parent of a different kind, such as loss of nurture, and training, it was not error to admit evidence of deceased's habits in regard to his family life. *Flinn v. New York, etc., R. Co.*, 22 N. Y. Supp. 473, 67 Hun 631.

Whether Deceased a Good or Bad Woman—Habits of Industry.—In an action by an administrator for the death of plaintiff's intestate, a witness cannot be asked whether deceased was a good woman or bad woman; but it is competent to inquire as to her industry, as tending to show that her life had a value as a life independent of her husband; but not if the industry referred to had reference only to her work around her house. So held in *Wilcox's Adm'r v. Wilmington City Ry. Co.*, 11 Del. 157, 44 Atl. 686.

Habits of Deceased—Effect on Pecuniary Relations with Next of Kin.—In an action for wrongful death, evidence is admissible to show the habits and character of deceased, so far as it affects the pecuniary relations of the next of kin to him, and the support, if any, they were receiving, or were likely to receive from him or were giving to him. So held in *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466.

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Habits of Industry and Thrift of Plaintiff's Deceased Husband.—In an action for the death of plaintiff's husband, in order to ascertain the measure of damages, it is proper to show his habits of industry and thrift. So held in *Flynn v. Fogarty*, 106 Ill. 263.

Deceased a Drunkard—Mitigation of Damages—In an action for wrongful death, evidence is admissible, for the purpose of mitigating damages, to show that deceased was a drunken worthless man. So held in *Nashville & Chattanooga Railroad Co. v. Prince*, 49 Tenn. 580.

Damages—Carefulness and Skill of Deceased.—In an action against his company for the death of a brakeman, evidence as to his reputation as a careful and skilled railroad man was admissible as bearing on the question of damages recoverable by his heirs. So held in *Wells v. Denver & Rio Grande W. Ry. Co.*, 7 Utah 482, 27 Pac. 688.

Plaintiff's Habits of Industry and Economy.—In an action for personal injuries from negligence, evidence of plaintiff's habits of industry and economy are admissible on the question of damages. So held in *Pennsylvania R. Co. v. Brooks*, 57 Pa. St. 339.

II. CUSTOM AND USAGE.

A. CAN NOT JUSTIFY OR EXCUSE NEGLIGENCE.

As a general rule, where the act or omission charged to a party is, in law, negligent per se, he can not introduce evidence of a custom or usage for the purpose of showing that the act or omission was not negligent.

United States.—*Henion v. New York, N. H. & H. R. Co.*, 79 Fed. 903; *Chicago, etc., Ry. Co. v. Carpenter*, 12 U. S. App. 392; *Texas & Pac. Ry. Co. v. Behymer*, 189 U. S. 468; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454.

Alabama.—*George v. Mobile & Ohio R. Co.*, 109 Ala. 245, 19 So. 784; *Hibler v. McCartney*, 31 Ala. 501; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

Georgia.—*Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459; *Central R. R. Co. v. DeBray*, 71 Ga. 406.

Illinois.—*Calumet Gas Co. v. Creutz*, 80 Ill. App. 96; *Chicago & A. R. Co. v. Harrington*, 77 Ill. App. 499; *City of Champaign v. Patterson*, 50 Ill. App. 63; *Wright v. Hildreth*, 69 Ill. App. 588.

Indiana.—*Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171.

Iowa.—*Ferguson v. Central Iowa R. Co.*, 58 Iowa 293, 12 N. W. 293; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Hosic v. Chicago R. I. & P. Ry. Co.*, 75 Iowa 683, 37 N. W. 963; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462.

Kansas.—*Southern Kansas Ry. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113; *Mason v. Missouri Pac. Ry. Co.*, 27 Kan. 83.

Louisiana.—*Fisher v. Brig Norval*, 8 Mart., N. S., 120.

Maine.—*Hill v. Portland & Rochester R. Co.*, 55 Me. 438.

Maryland.—*Merch. & Miners' Trans. Co. v. Story*, 50 Md. 5.

Massachusetts.—*Bailey v. New Haven & N. Co.*, 107 Mass. 497; *Hinckly v. Inhabitants of Barnstable*, 109 Mass. 126; *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070.

Minnesota.—*Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078; *Wherry v. Duluth, M. & N. Ry. Co.*, 64 Minn. 415, 67 N. W. 223.

Missouri.—*Crocker v. Schureman*, 7 Mo. App. 358.

Montana.—*Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81.

New Hampshire.—*Sewall's Falls Bridge v. Fisk & Norcross*, 23 N. H. 171.

New York.—*Cleveland v. New Jersey Steamboat Co.*, 12 N. Y.

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Supr. Ct. 523; Brooklyn City, etc., R. Co., 69 N. Y. 195; *Earl v. Crouch* (N. Y. Supr. Ct.), 16 N. Y. Supp. 770; *Magee v. City of Troy*, 48 Hun (N. Y. Supr. Ct.), 383, 1 N. Y. Supp. 24; *Wright v. Baller & Becktenwalt*, 42 Hun (N. Y. Supr. Ct.), 77.

Ohio.—*Grant v. Pittsburg & W. R. Co.*, 10 Ohio Cir. Ct. 362.

Pennsylvania.—*McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57.

South Carolina.—*Bridge v. Ashville & Spartanberg R. Co.*, 25 S. Car. 24.

Tennessee.—*Lawrence v. Hudson*, 59 Tenn. 672.

Texas.—*Gulf, C. & S. F. Ry. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475; *Texas & Pac. Ry. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366; *Texas M. R. v. Taylor* (Tex. Civ. App.), 44 S. W. 892.

Utah.—*Jenkins v. Hooper Irrigation Co.*, 13 Utah 100, 44 Pac. 829.

Vermont.—*Temperance Hall Assn. v. Giles*, 4 Vt. 260.

Washington.—*Ilwaco Ry. & N. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335.

Wisconsin.—*Douglas v. Chicago, etc., Ry. Co.*, 100 Wis. 405, 76 N. W. 356.

What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a reasonable prudence, whether it is usually complied with or not. So held in *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454.

Reckless or Negligent Acts of Other Men.—Evidence that other men have attempted or performed reckless and negligent acts of a certain character is not admissible in evidence to justify or excuse one for attempting or performing the same reckless and negligent act. So held in *Wherry v. Duluth, M. & N. Ry. Co.*, 64 Minn. 415, 67 N. W. 223.

Derring on Negligence.—In *Derring on Negligence*, § 9, the author says: "It may be stated as a general rule that where a party is charged with negligence he will not be allowed to show that the act complained of was customary among those engaged in a similar occupation or those placed under like circumstances, and having the same duties."

Gillet on Indirect and Collateral Evidence.—In *Gillet on Indirect and Collateral Evidence*, section 128, the author says: "In the majority of negligence cases the question of negligence is of such a character that it must be presumed that the jurors, representing men taken from the various walks of life, are competent to decide the question upon ascertaining the immediate facts, and upon being advised of the law. In such cases there is not occasion to appeal to the habits and customs of others to aid the jury. But in cases where the question involved is of such a character that the jury will be aided by being advised of the practices of others under like circumstances such evidence is competent, at least where the custom is a general or universal one. The fact that it is a general or universal tends strongly to show its reasonableness."

Noncontractual Duty—Fixed Conditions.—In *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986, it is said in the opinion: "But not even a general custom can be a relevant fact in an action for negligence respecting any noncontractual duty which is not performed under fixed conditions."

Vehicle Running into Building Materials—Custom as to Place for Depositing Materials.—In an action for personal injuries resulting from plaintiff's vehicle running into building materials piled and left unguarded in a street at night, evidence was not admissible for the purpose of showing whether the materials were not placed as they usually are in such cases, as the defendant city could not be permitted to substitute a bad custom for the performance of its duty. So held in *Magee v. City of Troy*, 48 Hun. (N. Y. Supr. Ct.), 383, 1 N. Y. Supp. 24.

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Personal Injuries—Custom of Towns to Leave Drains Uncovered.—In an action against a town for personal injuries resulting from leaving a drain uncovered in a highway, testimony was inadmissible to show that it was the custom for towns in that county to leave drains uncovered, as proof of such custom did not tend to show absence of negligence on the part of defendant. So held in *Hinckly v. Inhabitants of Barnstable*, 109 Mass. 126.

Construction of Sidewalks and Street Crossings—Method Adopted by Other Municipalities in Immediate Section.—In an action against a city for injuries alleged to have resulted from a defect in a sidewalk or street crossing, defendant could not introduce evidence of the manner in which other cities and towns of similar size and character, in the immediate section of country, constructed their walks and crossings. So held in *City of Champaign v. Patterson*, 50 Ill. 63.

Nuisance in Street—Justification.—No custom or usage is admissible in evidence for the purpose of justifying the creation of a nuisance in a street. So held in *Wright v. Hildreth*, 69 Ill. App. 588.

Injury to Horse—Unprotected Ditch—Same Precautions Used by Others in Same Business.—In an action for injuries to a horse resulting from leaving a ditch unprotected at night, evidence is not admissible to show that the parties in charge of the ditch took the same precautions which other men in the same business ordinarily took. So held in *Calumet Gas Co. v. Creutz*, 80 Ill. App. 96.

Personal Injuries from Fall of Building—Custom to Build in Unsafe Style.—In an action for personal injuries resulting from the falling of part of a building, evidence was not admissible to show that other buildings in the city were alike defective, or that at the time the building was erected the custom among builders was to build in a like unsafe style. So held in *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628.

Person Swept from Wagon by Guy Rope—Custom of Other Contractors in Suspending Ropes over Streets.—A custom established among those engaged in the same kind of work is not admissible in evidence to excuse or justify the commission of an act negligent per se. So held in *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078. This action was based on the alleged negligence of contractors in stretching a guy from the top of a derrick across a public street, by which guy plaintiff claimed he was swept from his wagon. It was held that it was error to permit defendants to show at what height above public ways it was usual for contractors to suspend guys or ropes.

Injury to Child—Custom of Railroads to Leave Turntables Unfastened.—In an action for the death of a child, killed while playing with an unlocked turntable, evidence of the custom of railroads to leave turntables unfastened is inadmissible, on the question of the defendant's negligence. So held in *Ilwaco Ry. & N. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335.

In an action for injuries to a child sustained while playing on an unlocked and unguarded turntable, the custom of well-regulated railroads to leave turntables in such condition can not be invoked to excuse defendant. So held in *Bridge v. Ashville & Spartanberg R. Co.*, 25 S. Car. 24.

Crossing Accident—Flagman at Similar Crossings—Custom of Railroads.—In an action for injuries to a person struck by a train at a crossing, where there was a single track and no flagman, defendant can not introduce evidence to show what is the custom of railroads with respect to having flagmen at similar crossings. So held in *Bailey v. New Haven & N. Co.*, 107 Mass. 497.

In this case it is said in the opinion: "The thing sought to be proved by these witnesses called experts was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other. It was rather a practice

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of railroad companies as to using or omitting a certain precautionary measure at certain crossings. But the need of a flagman depends upon the situation and circumstances of each particular crossing, and these must be known in order to determine intelligently whether or not there ought to be a flagman there. The practice at each crossing would therefore raise a separate collateral issue, and if it were settled it would not aid us in determining the issue before us."

Horse Frightened at Crossing—Similar Signals Given by Other Railroads.—In an action for personal injuries, resulting from plaintiff's horse becoming frightened by the loud and sudden blowing of defendant's whistle, at a crossing near a station, it was not competent for defendant to ask a witness acquainted with the practice of railroads generally, and who had had charge of another railroad for sixteen years, whether or not similar signals were given by other railroads. So held in *Hill v. Portland & Rochester R. Co.*, 55 Me. 438.

In this case it is said in the opinion: "It does not appear in terms, whether the object was to prove a general custom on all railroads. The question might be limited to one or two roads. But, if such a general custom could be established, it would not be a legitimate defense in this case, or tend to establish it. If all the railroads in the country adopt any rule or custom, which is unreasonable or dangerous and productive of injury, the generality of the custom, in a given case, will not in any degree excuse or justify the act."

Pedestrian Hit by Plank Blown from Lumber Yard—Common Custom Not to Fasten Lumber Down.—In an action for personal injuries to a pedestrian, hit by a board blown from a lumber pile in defendant's lumber yards, evidence that it was the common custom, in lumber yards in that city, where a pile was once opened and was being used, not to again fasten the lumber down, was not admissible to excuse defendants. So held in *Wright v. Baller & Becktenwalt*, 42 Hun (N. Y. Supr. Ct.), 77.

Injury to Child—Custom of Other Lumber Dealers to Pile Lumber in Same Manner.—In an action for injury to a child, sustained while it was attempting to climb over lumber piled near a sidewalk, evidence that other lumber dealers were accustomed to pile lumber in the same dangerous manner was incompetent to excuse defendant. So held in *Earl v. Crouch* (N. Y. Supr. Ct.), 16 N. Y. Supp. 770.

Grain Destroyed by Fire—Custom Not to Plow Around Stacks.—In an action for the value of certain stacks of grain, destroyed by fire set by one of defendant's locomotives, evidence of the custom of the neighborhood not to plow around such stacks is not admissible for the purpose of showing freedom from contributory negligence. So held in *Ormond v. Central Iowa Ry. Co.*, 15 Iowa 742.

Fire—Usual Method in Guarding Fires Kindled in Clearing Railroad Locations.—In an action for the destruction of property by fire, alleged to have resulted from defendant's negligent acts while burning and clearing a railroad location, evidence is not admissible, on the question of negligence to show the usual practice adopted, within the limits of the experience of a civil engineer, in guarding fires kindled in clearing and grubbing on railroad locations. So held in *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986.

Injury to Bridge—Custom in Running Logs in Another State.—In an action for injuries to a bridge, caused by defendants putting a large quantity of logs into the river and negligently running them against the bridge, evidence of the usage and custom in running logs in another state was incompetent on the question of defendant's freedom from negligence. So held in *Sewall's Falls Bridge v. Fisk & Norcross*, 23 N. H. 171.

Injury to Land—Care Used by Other Irrigation Companies in Cleaning Canals.—In an action for injuries to land from the alleged negligence of defendants in maintaining their irrigation canal, evi-

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dence as to the care used by other irrigation companies in cleaning their canals was not admissible to prove that defendants used due care by clearing their canal at the same time and in the same way. So held in *Jenkins v. Hooper Irrigation Co.*, 13 Utah 100, 44 Pac. 829.

Injury to Stock—Customary Practice in Managing Trains.—But in an action for the value of stock struck by a locomotive, defendant may show the customary and usual practice in the managing of trains under similar circumstances; this being expert testimony on a scientific subject. So held in *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387.

Injury to Employee—Obviously Dangerous Custom.—In an action for injury to an employee, a custom or usage obviously dangerous, and the facts alleged in the declaration showing that it would be dangerous, is not admissible to excuse contributory negligence by the injured employee. So held in *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459.

Injury to Employee—Custom of Doing Work by Dangerous Method—Choice of Methods.—An employee can not show that it was customary to perform the duty in question in the dangerous way, for the purpose of relieving himself of the consequences of contributory negligence in choosing the dangerous method, when he had the choice between that and an entirely safe method. So held in *George v. Mobile & Ohio R. Co.*, 109 Ala. 245, 19 So. 784.

Custom of Switchmen to Ride in Dangerous Positions without Necessity.—In an action for injuries to a switchman, he can not show, in order to excuse or justify his conduct in riding on the foot-board of a locomotive, that switchmen ordinarily and customarily ride in dangerous places when there is no necessity for doing so. So held in *Chicago & A. R. Co. v. Harrington*, 77 Ill. App. 499.

Brakeman Jumping from Train without Looking for Obstructions—Custom of Other Employees.—In an action for injuries to a brakeman, sustained while jumping from a moving freight train without looking or being able to see where he would alight or what obstructions he would meet, evidence is not admissible to show that he was doing only what was ordinarily done by employees engaged in like employment and under similar circumstances, with the knowledge and approval of defendant's superintendent. So held in *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070.

Injury to Brakeman—Custom to Step in Front of Engine to Turn Switch.—In an action for injury to a brakeman, it appeared that he, in order to turn a switch and turn the train onto a side track, stepped from the front of the pilot of the advancing engine to the centre of the track immediately in front of the engine, and was run over by it. It was held that plaintiff could not, for the purpose of justifying or excusing his conduct, introduce evidence to prove that brakemen usually perform the same work in the same manner that plaintiff had attempted to perform it. So held in *Grant v. Pittsburg & W. R. Co.*, 10 Ohio Cir. Ct. 362.

Leaning Out of Engine Cab to Deliver Mail to Another Employee—Custom of Other Trainmen.—In an action for the death of a railroad fireman, struck by part of a bridge while leaning out of the engine cab to deliver a postal card to another employee, evidence of a custom of defendant's employees thus to deliver mail to each other was inadmissible to relieve deceased from the imputation of contributory negligence. So held in *Texas M. R. v. Taylor* (Tex. Civ. App.), 44 S. W. 892.

Death of Conductor from Fall from Box Car—Usage of Others in Climbing Such Cars.—In an action for the death of a passenger conductor, caused by a fall from the ladder of a box car while the train was in motion, evidence of the practice and usage of others in climbing such ladders when the train is in motion is inadmissible to prove that deceased was free from contributory negligence at the time he

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was killed, it not being claimed that the proper method of climbing such cars was subject for expert testimony, and the evidence being such as would create collateral issues. So held in *Southern Kansas Ry. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113.

Freight Destroyed by Fire—Custom to Carry Torch-Lights on Steamboats.—In an action against a carrier for loss by fire caused by the negligent use of torch-lights, evidence is not admissible, on the issue of the carrier's liability, of a custom to carry such lights at night on board steamboats. So held in *Hibler v. McCartney*, 31 Ala. 501.

Custom of Other Railroads to Fill and Light Lamps in Freight Rooms.—In an action for the value of freight destroyed by fire while in the carrier's depot, evidence as to the custom of other railroad companies to keep oil and fill and light their lamps in the freight rooms of their depots was inadmissible to excuse defendant. So held in *Texas & Pac. Ry. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366.

Custom of Carrier to Store Freight on Its Wharf.—In an action against a carrier, as a warehouseman, for damage to freight, evidence that it was its custom to store freight, awaiting removal by consignees, on its wharf was inadmissible for the purpose of relieving it from liability. So held in *Merch. & Miners' Trans. Co. v. Story*, 50 Md. 5.

Cotton Left on Levee Destroyed by Fire—Watchmen—Custom in City.—In an action for the value of cotton destroyed by fire while left on a levee for shipment, evidence that it was not customary in the city to put any person as guard over cotton bales, in the situation in which plaintiff's cotton was left, was inadmissible to justify the carrier. So held in *Fisher v. Brig Norval*, 8 Mart., N. S. (La.), 120.

Injury to Steamboat Passenger—Delay in Closing Gangway—Custom on Other Passenger Boats.—In an action for injury to a passenger, caused by negligence in allowing the steamboat to leave the dock before the gangway gate was properly secured, defendant asked a witness: "Is it customary on the Hudson river, on passenger boats leaving a dock at New York, to wait for the departure until the gates at the gangway entrance are put in?" It was held that the question was properly rejected, that the offer was, in effect, to show as an excuse for defendant's negligence, a custom of others to be equally negligent. *Cleveland v. New Jersey Steamboat Co.*, 12 N. Y. Supr. Ct. 523.

Negligence of Omnibus Driver—Leaving Small Boy in Charge—Custom of Cautious Drivers.—In an action for the negligence of defendant's omnibus driver, in stopping on a declivity and quitting his seat to hand down a package, leaving the reins in charge of a small boy, the testimony of another omnibus driver that there was nothing imprudent in this, that it was the universal custom, and that the most cautious drivers did it, was inadmissible on the question whether there was negligence on the part of the driver at the time of the accident. So held in *Lawrence v. Hudson*, 59 Tenn. 671.

Endangering Employees—Custom of Well Regulated Railroads.—Evidence of a custom of well regulated railroads is not admissible to justify acts of a railroad which endanger the safety of its employees. So held in *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

Custom of Other Masters to Furnish Defective Machinery or Unsafe Place to Work.—As a general rule, a master can not show as a defense, in an action for injury to an employee based on failure to furnish reasonably safe and suitable machinery, or a reasonably safe place to work, that it was a general or universal custom of other masters to furnish defective implements or an unsafe place to work. So held in *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564.

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Brakeman Thrown from Top of Car—Sudden Stoppage of Car—Usual Method of Handling Train.—In an action for injuries sustained by a brakeman by falling from a car, based upon negligence in suddenly stopping the car with knowledge of his position and the slippery condition of the roof of the car, it was not error to refuse to rule that the question of negligence in handling the train depended on whether it was handled in the usual way. So held in *Texas & Pac. Ry. Co. v. Behymer*, 189 U. S. 468.

Injury to Employee Handling Baggage—Proximity of Platform to Track—Platforms of Other Companies.—On the question whether a station platform was reasonably safe for employees handling baggage, or whether it was dangerous because too narrow, or located too near the track, evidence showing how the platforms of other companies are constructed is incompetent. So held in *Henion v. New York, N. H. & H. R. Co.*, 79 Fed. 903.

Injury to Car-Coupler—Track Kept in Similar Condition by Another Railroad.—In an action for injury to a brakeman, sustained while he was coupling cars, by reason of an alleged defect in the track, evidence that another railroad kept its track in similar condition to that of defendant is inadmissible on the issue of defendant's negligence in so maintaining it. So held in *Gulf, C. & S. F. Ry. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475.

B. WHEN ADMISSIBLE FOR PURPOSE OF JUSTIFYING OR EXCUSING ALLEGED NEGLIGENCE.

But where the act or omission charged does not constitute negligence per se, the party sought to be held responsible may, as a general rule, show that the act or omission was sanctioned by the usage or custom prevailing among those engaged in the same business or same kind of work.

United States.—*Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49; *Clark v. Barwell*, 12 How. (U. S.), 272; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Railroad Co. v. Blake*, 11 C. C. A. 93, 63 Fed. 45; *Rich v. Lambert*, 12 How. (U. S.), 347; *The Titania*, 19 Fed. 101.

Alabama.—*Holland v. Tenn. Coal, Iron & R. Co.*, 91 Ala. 444, 8 So. 524; *Johnson v. Lightsey*, 34 Ala. 169; *Northern Ala. Ry. Co. v. Mansell (Ala.)*, 11 R. R. R. 186, 34 Am. & Eng. R. Cas., N. S., 186, 36 So. 459.

California.—*Hennesey v. Bingham*, 125 Cal. 627, 58 Pac. 200; *Waters v. Moss*, 12 Cal. 535.

Connecticut.—*Barber v. Brace*, 3 Conn. 9; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

Illinois.—*Illinois Cent. R. Co. v. Prickett (Ill.)*, 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139, 71 N. E. 435.

Indiana.—*Indiana, I. & I. R. Co. v. Bundy (Ind.)*, 14 Am & Eng. R. Cas., N. S., 660.

Iowa.—*Brantz v. Omaha & C. B. R. & B. Co.*, 120 Iowa 406, 94 N. W. 906; *Spaulding v. Chicago, St. P. & K. C. R. Co.*, 98 Iowa 205, 67 N. W. 227; *Whitsett v. Chicago, R. I. & Pac. Ry. Co.*, 67 Iowa 150, 25 N. W. 104.

Louisiana.—*Myers v. Perry*, 1 La. Ann. 372.

Massachusetts.—*Cass v. Boston & Lowell R. Co.*, 96 Mass. 448; *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.), 123; *McCarthy v. Boston Duck Co.*, 165 Mass. 165, 42 N. E. 568; *Maynard v. Buck*, 100 Mass. 40; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631; *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070.

Michigan.—*Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Carr v. St. Clair Tunnel Co.*, 131 Mich. 591; *Hewitt v. Railroad Co.*, 67 Mich. 61, 34 N. W. 659; *Turner v. Detroit Southern*

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R. Co. (Mich.), 13 R. R. R. 163, 36 Am. & Eng. R. Cas., N. S., 163, 100 N. W. 268.

Minnesota.—Kelly *v.* Southern Minn. Ry. Co., 28 Minn. 98, 9 N. W. 588; Kolsti *v.* Minneapolis, etc., Ry. Co., 32 Minn. 133, 19 N. W. 655.

Missouri.—Bohn *v.* Railway Co., 106 Mo. 429, 17 S. W. 580.

Montana.—Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81.

Nebraska.—Bottling Co. *v.* Theiler (Neb.), 80 N. W. 821.

New Hampshire.—Aldrich *v.* Monroe, 60 N. H. 118.

New Jersey.—Gillespie Co. *v.* Cumming, 62 N. J. L. 370, 41 Atl. 693.

New York.—Jarvies *v.* Brooklyn El. R. Co. (City Ct.), 16 N. Y. Supp. 96.

North Carolina.—Lloyd *v.* Hanes, 126 N. Car. 359, 35 S. E. 611.

Ohio.—Strong *v.* Pickering Hardware Co., 9 Ohio Cir. Ct. 249.

Pennsylvania.—Beck *v.* Hood, 185 Pa. St. 32, 39 Atl. 842.

Rhode Island.—Benson *v.* New York, N. H. & H. R. Co. (R. I.), 22 Am. & Eng. R. Cas., N. S., 299, 29 Atl. 689.

Tennessee.—Kelton *v.* Taylor & Co., 79 Tenn. 246; Louisville & N. R. Co. *v.* Manchester Mills, 88 Tenn. 654, 14 S. W. 314.

Texas.—Railway *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Houston, etc., Ry. Co. *v.* Cowser, 57 Tex. 293.

Utah.—Nelson *v.* Southern Pac. Co., 18 Utah, 244, 55 Pac. 364.

Vermont.—Belleville Stone Co. *v.* Comben, 32 Vt. 353.

Washington.—Hoffman *v.* Foundry Co., 18 Wash. 287, 51 Pac. 385.

Wisconsin.—Curtis *v.* Chicago & N. W. R. Co., 95 Wis. 460, 70 N. W. 665; Jochem *v.* Robinson, 72 Wis. 199, 39 N. W. 383.

Reason for Admitting—Method of Doing Act Not Matter of Common Knowledge.—In *Simonds v. City of Baraboo*, 93 Wis. 40, 67 N. W. 40, it is said in the opinion: "The general rule, subject to many limitations and exceptions, is that evidence of custom bearing on the fact of negligence, when such fact is in issue, is admissible. Whart. Neg. § 46, Black, Proof & Pl., § 36, Bailey, Master's Liability, 527, and cases cited.

There is considerable conflict of modern judicial authority on the subject, though the trend of decisions has been rather in favor of a liberal application of the general rule, yet preserving rigidly the exceptions thereto. * * * At the foundations of the rule lies the idea that the act constituting the subject of the custom is one in respect to which the manner of doing it is not a matter of common knowledge."

Established Usage in Navigating Certain River.—In the absence of any express law on the subject, an established usage among those engaged in navigating the Mississippi river with steamers is admissible as tending to aid in determining the question of negligence in the management of boats on the river, where a collision occurs. So held in *Myers v. Perry*, 1 La. Ann. 372.

Fall over Structure on Sidewalk—Customary Manner of Erecting and Maintaining.—In an action for personal injuries sustained by falling over a structure erected and maintained by defendant on a sidewalk, evidence was admissible to show that the structure was erected and maintained in the ordinary manner, as such evidence may raise a strong presumption that there was no negligence on the part of defendant, though it is not conclusive. So held in *Strong v. Pickering Hardware Co.*, 9 Ohio Cir. Ct. 249.

Skid Across Sidewalk—Customary Method of Unloading Merchandise.—In *Jochem v. Robinson*, 72 Wis. 199, 39 N. W. 383, it appeared that defendant, in order to unload several barrels of sugar into his store, placed a skid across the sidewalk, and that plaintiff, in attempting to pass over it, fell and was injured. It was held that evidence for defendant as to the usual and customary method of handling goods in that vicinity was properly admitted.

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Fall into Trench—Obstructions in Highway—Customary Location of Warning Lights.—In an action for personal injuries, it appeared that defendant having dug a trench across the highway, laid a temporary bridge over part of it, on one side of the road, and at night put a red light at each side of the bridge, and that plaintiff approaching on a bicycle, thought that the red light indicated that the danger was between them, and attempting to pass outside of them, fell into the trench. It was held that evidence was admissible to show that it was the usual practice for persons placing obstructions in the highway to put a red light at each end of the obstruction. So held in *Gillespie Co. v. Cumming*, 62 N. J. L. 370, 41 Atl. 693. See also, *Beck v. Hood*, 185 Pa. St. 32, 39 Atl. 842.

Care of Horse by Liveryman—Custom in Same Business.—But on the issue of ordinary care of plaintiff's horse by stablekeeper, where the evidence is conflicting as to the circumstances of the case, testimony of an expert, as to the practice and care of others in the same business as defendant, "under like circumstances," may be properly excluded, as affording no definite basis for the testimony and the opinion of the witness. So held in *Eastham v. Riedell*, 125 Mass. 585.

Use of Same Kind of Spark Arresters by Other Railroads—Duty to Use Best Devices Available.—And in an action to recover the value of property destroyed by fire set by one of defendant's locomotives, evidence that other railroads used the same kind of spark arresters as defendant is properly excluded; it being the duty of a railroad company to use the best devices available to prevent the escape of fire from its engines. So held in *Metzgar v. Chicago, M. & St. P. Ry. Co.*, 76 Iowa 387, 41 N. W. 49.

Destruction of Adjacent Property by Fire—Custom of Other Mill Owners Not to Use Spark Arresters—Similar Circumstances.—And in an action to recover the value of property destroyed by fire set by sparks from defendant's mill chimney, constructed of brick, evidence is not admissible to show that the large majority of mill owners, having mills with brick chimneys, did not use spark arresters, as such fact would not be pertinent to the case, unless it appeared that such other mills were similarly situated with respect to surrounding property. So held in *Hoyt v. Jeffers*, 30 Mich. 181.

Negligence of Employee—Practice of Experienced Persons.—Where the act of an employee was not negligence per se, it is competent, for the purpose of justifying or excusing the act, to show that persons experienced in the performance of the same act, under similar circumstances, performed it as he did. So held in *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81.

Injury to Brakeman—Method Usually Pursued by Employees of Other Railroads.—In an action for injuries to a brakeman, evidence was admissible, to show that he was not guilty of contributory negligence, to prove that, in performing the work in which he was engaged at the time of the accident, he adopted the method usually pursued under the same circumstances by men in that calling, though in the employment of other companies. So held in *Whitsett v. Chicago, R. I. & Pac. Ry. Co.*, 67 Iowa 150, 25 N. W. 104.

Horse Killed by Train—Custom to Allow Stock to Roam at Large.—In an action for the value of a horse killed by a train, plaintiff is entitled to prove the custom of the country to allow stock to roam at large upon the commons, where it is claimed that plaintiff was negligent in thus allowing his horse to run at large. So held in *Waters v. Moss*, 12 Cal. 535.

Death of Stockman Accompanying Cattle—Custom of Going upon Top of Cars.—In an action for the death of a person, killed while accompanying cattle in transit, evidence of a custom among stockmen of going upon the top of cars, under the circumstances and conditions surrounding deceased when he was killed, was admissible as tending

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to prove that he was in the discharge of his duties at the time, and not guilty of contributory negligence. So held in *Nelson v. Southern Pac. Co.*, 18 Utah 244, 55 Pac. 364.

Injury to Employee—Contributory Negligence—Customary Way of Operating Elevator.—In an action for injury to employee from a defect in an elevator, evidence of the customary way of sending the elevator up and down in the warehouse in question was admissible upon the question of plaintiff's negligence and whether he was in the line of his employment when injured. So held in *Tvedt v. Wheeler*, 70 Minn. 161, 72 N. W. 1062.

Injury to Brakeman—Riding inside Rear Car—Custom Contrary to Rule.—But in an action for injuries to a rear brakeman or flagman of a freight train, sustained in going from the inside of a care to the top by ladder strips, evidence is inadmissible to show it was customary to ride inside of the rear car, where the rules of the company required that the brakeman must not leave his brakes while the train is in motion, nor take any other position on the train than that assigned him by the conductor, and declaring that the post of the rear brakeman or flagman is on the last car in the train, which he must not leave except to protect the train. So held in *Gordy v. New York, P. & N. R. Co.*, 75 Md. 297, 23 Atl. 607.

Injury to Driver—Contributory Negligence—Customary Way of Loading and Hauling Wood.—And in an action for injuries to the driver of a wagon loaded with wood, alleged to have been caused by a defect in the street, evidence was not admissible, on the question of contributory negligence, of the customary way of loading and hauling wood. So held in *Simonds v. City of Baraboo*, 93 Wis. 40, 67 N. W. 40.

Custom of Other Masters to Use Certain Machinery.—In an action for injury to an employee, on the issue of negligence in using certain machinery and appliances, the master may show that they are used by the owners of other similar works, well-regulated and prudently managed. So held in *Holland v. Tenn. Coal, Iron & R. Co.*, 91 Ala. 444, 8 So. 524.

Inspection of Engines—Custom of Well-Regulated Railroads.—A railroad company, in an action for the death of an employee, may prove the general custom of well-regulated and prudently managed railroad companies as to the time and manner of inspecting their engines and boilers. So held in *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139, 71 N. E. 435.

Injury to Miner—Other Kinds of Machinery Used in Other Mines.—In *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, it is said in the opinion: "In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery in actual use, it was competent to show what other kinds of machinery were used elsewhere and might have been used at the shaft."

Water Trains—Conductors—Custom of Other Railroads.—In *Railway v. Harriett*, 80 Tex. 73, 15 S. W. 556, it was held that, on the issue whether it was negligence to send out a water train without a conductor, the custom of other railroads in that respect was competent evidence.

Emergency—Customary Method of Employees.—Where the question is whether, in a particular emergency, an employee was negligent in the method pursued by him in rendering a service, the general custom or usage as to the method of rendering such service may be shown. *Pierson v. Chicago & N. W. Ry. Co.* (Iowa), 15 R. R. R. 332, 38 Am. & Eng. R. Cas., N. S., 332, 102 N. W. 149.

Employment of Same Class of Hands for Certain Work by Other Employers.—In an action for injury to an employee, on the question of the master's care and diligence in employing hands to assist the injured employee in performing certain work, evidence showing

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that many well-regulated works of the same kind habitually employed the same class of men as those who were employed to assist plaintiff was competent. So held in *Holland v. Tenn. Coal, Iron & R. Co.*, 91 Ala. 444, 8 So. 524.

Brakeman Injured While Dismounting from Car—Failure to Use Ladder—Choice of Customary Method.—In *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 150, 25 N. W. 104, it is said in the opinion, with reference to the action of a brakeman in stepping from a freight car to the tender of the engine in order to dismount from the train by means of the engine steps to operate a switch, instead of dismounting by means of the ladder provided on the freight car: "In the absence of express rule or direction prescribing the particular course he should pursue under the circumstances, he was required to choose between two courses; and if, in making that choice, he adopted the course usually followed under like circumstances by men in that calling, that fact would have a very important bearing upon the question whether he exercised due care in making the choice."

Section Hand Struck by Projecting Car Steps—Common Use of Such Cars on Other Roads.—In an action against a railway company for personal injuries to a section hand, from being struck by a tie, which in turn was struck by projecting steps fastened to the side of a box car used as a caboose, and extending about 15 inches from the car, but extending so far as the widest projections on the engine of the train, evidence that the defendant had used such cars for four years without accident, and that they were in common use on other roads, showed that defendant was not negligent in using such cars. So held in *Turner v. Detroit Southern R. Co.* (Mich.), 13 R. R. R. 163, 36 Am. & Eng. R. Cas., N. S., 163, 100 N. W. 268.

Fall of Brakeman from Roof of Car of Peculiar Construction—Use of Such Cars in New England.—In *Benson v. New York, N. H. & H. R. Co.* (R. I.), 22 Am. & Eng. R. Cas., N. S., 299, 49 Atl. 689, it appeared that plaintiff, a brakeman, was injured by falling from the roof of a freight car in attempting to step from one car to the other. The accident occurred on a dark night, and the roof of the car which plaintiff attempted to reach extended 18 inches over the end wall, and in the diagonal of the same 18½ inches long and 23½ inches wide, had been cut to allow the brakeman to go up and down the ladder. Plaintiff fell through such hole. It was held that evidence that such cars were used on other roads in New England was improperly refused.

Custom in Violation of Rule—Waiver of Rule by Master.—In *Lowe v. Chicago, St. P. M. & O. R. Co.*, 89 Iowa 420, 56 N. W. 519, where it was claimed that the acts of an employee constituted contributory negligence, because in violation of the rules of the company, agreed to by him, although in accordance with the usage and custom of other employees under similar circumstances, it is said in the opinion: "There is a conflict in the cases, some of them holding that a usage or custom can not be shown as against a rule or contract like that under consideration: but we think it is clear that it is competent to show a usage or custom on the part of the employees of defendant at variance with and in violation of such a rule when the defendant has, through its proper officers, knowledge of its violation, and their conduct shows that they acquiesced in such violation."

Practice of Making "Flying Switches."—In *Carr v. St. Clair Tunnel Co.*, 131 Mich. 592, it is held that as the practice of making "flying switches" is a method in common use, it does not constitute negligence as to employees.

Injury to Stevedore—Usual Method of Lowering Lumber into Vessel.—In an action for injuries to an experienced stevedore, sustained while he was lowering lumber into the hold of a vessel for his employer, by reason of the slipping of the lumber from an unsecured box, which bounded upon him, evidence of the custom of

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stevedores in handling such lumber was admissible for defendant, as tending to show what care was taken by defendant in the work, and what risks plaintiff impliedly assumed. So held in *Hennesey v. Bingham*, 125 Cal. 627, 58 Pac. 200.

Injury to Employee—Uneven Track—Comparison with Other Tracks within State.—But on the issue of negligence of a railway company in allowing the surface of its track to be uneven so as to endanger walking thereon by employees in the discharge of their duties, the opinion of a witness as to the comparison of such track with those of others in the state, generally, is not competent. So held in *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. 891.

Employee Struck by Broken Machine Belt—Other Kinds of Fastenings.—And in an action for injury to an employee, by being struck by a belt on a machine which broke at the point where it was fastened together by an iron plate, if the principal issue is whether defendant had used reasonable care in furnishing a proper belt, it is within the discretion of the judge to exclude evidence offered to show that there were other kinds of fastenings which could have been used to better advantage, but not amounting to an offer to show that such other fastenings were in common use as fastening for belts. So held in *McCarthy v. Boston Duck Company*, 165 Mass. 165, 42 N. E. 568.

Injury to Employee—Similar Switch Device Used by Another First-Class Railroad.—And in an action for injuries to one of its employees, a railroad company can not introduce evidence to show that the construction of its switch device is similar to like devices upon another first-class railroad, in order to show absence of negligence. So held in *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175.

Theft of Freight—Railroad as Warehouseman—Care Usually Exercised by Railroads in Vicinity.—In an action against a railroad company, as a warehouseman, to recover for property stolen from them, defendant may show that it exercised the same degree of care in keeping the property that was usually exercised in the vicinity in relation to such property by other railroads. So held in *Cass v. Boston & Lowell R. Co.*, 96 Mass. 448.

Customary Method of Storing Freight in Vessel.—A charge of negligence and mismanagement in the stowage of certain goods for transportation, may be repelled by proof of a custom to store goods of that kind, for such a voyage, in the manner in question. So held in *Barber v. Brace*, 3 Conn. 9.

Action against Carrier—Custom to Lash Flat-Boats Together.—Where it has been shown that the carrier, at the time of the accident which caused the injury complained of, was descending a river with two flat-boats lashed together, he may show that flat-boats were frequently carried down the river in that manner, and that it was a customary mode of navigating the river. So held in *Johnson v. Lightsey*, 34 Ala. 169.

Seaworthiness of Vessel—Usages of Port or Country.—One of the tests of the seaworthiness of a vessel is the customs and usages of the port or country from which the vessel sails. So held in *The Titania*, 19 Fed. 101.

C. WHETHER PLAINTIFF MAY SHOW DEFENDANT'S VIOLATION OF GENERAL USAGE APPLICABLE TO PARTICULAR BUSINESS OR WORK.

Where plaintiff claims that some act or omission in carrying on a certain business or work, for which he seeks to hold defendant responsible, was negligent, it is usually competent for plaintiff to show the applicable usage or custom of those engaged in the same business or work. *Anderson v. Illinois Cent. Ry. Co.*, 109 Iowa 524; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121; *Berberich v. Louisville*

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Bridge Co. (Ky.), 46 S. W. 691; Belleville Stone Co. *v.* Comber, 61 N. J. L. 353; Jarvis *v.* Brooklyn El. R. Co. (City Ct.), 16 N. Y. Supp. 96; Gulf C. & S. F. Ry. Co. *v.* Hockaday, 14 Tex. Civ. App. 613, 37 S. W. 475; Railway *v.* Reed, 88 Tex. 439, 31 S. W. 1058; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135.

Employee Struck by Train While Working on Bridge—Notice of Danger—Custom of Other Bridge Companies.—In an action for injuries to the employee of a bridge company, struck by a passing train, while he was working on the bridge, evidence is admissible to show the custom of bridge companies to give notice of danger on bridges of the same character. So held in *Berberich v. Louisville Bridge Co.* (Ky.), 46 S. W. 691.

Personal Injuries—Driving Wagon Too Close to Wagon Plaintiff Was Loading—Customary Way of Loading.—In an action for personal injuries alleged to have resulted from the negligence of defendant's servant in driving within 6 or 12 inches of plaintiff's wagon, while plaintiff was sitting on his load, it was competent to show that plaintiff was loading his wagon in the customary way in the drive-way, and that defendant's driver knew what the customary way of loading was there, as affecting the question of negligence in driving as close as he did to plaintiff's wagon. So held in *Boick v. Bissell*, 80 Mich. 260, 45 N. W. 55.

Defendant's Custom to Back-Fire—Cross-Examination.—But in an action for injury from fire alleged to have been kindled by defendant, he can not be cross-examined as to a custom to back-fire, for the purpose of proving his negligence, where he neither admitted he set the fire nor testified to any custom on his examination in chief. So held in *Willis v. Lance*, 28 Ore. 371, 43 Pac. 384. In this case it is said in the opinion: "The plaintiff's action being founded in tort precludes the defendant from proving the existence of any custom or usage to excuse his alleged negligence, and, this being so, by what right could the plaintiff insist upon proving a custom for the purpose of establishing the defendant's liability?"

Fire Kindled in Clearing Land—Precautions Taken by Witness on Same Day.—And in *Sturges v. Robbins*, 62 Me. 289, the action was based on a statute, in affirmance of the common law, requiring fires kindled in clearing land to be started "at a suitable time and in a careful and prudent manner," and plaintiff offered to show what precautions were taken by a witness who set another fire on the same day that defendant set fire in question. But the court said: "The mode and manner in which this witness set, or managed his fire when set, were immaterial to the issue. The conditions under which his fire was set may have been entirely different from those attendant upon that set by the defendant."

Death of Employee—General Use of Certain Implement.—In an action for the death of an employee, plaintiff can show that a certain implement was generally used for the kind of work in which decedent was engaged, and that it was not furnished to decedent. So held in *Anderson v. Illinois Cent. Ry. Co.*, 109 Iowa 524.

Injury to Miner—Duty to Inspect Mine Roofs—Custom in Mining District.—In an action for injuries to a miner, caused by the falling of a roof in a mine, on the issue of the master's negligence, evidence of a custom in the mining district that an operating company should look after the safety of roofs of entries to the mines was admissible. So held in *Taylor v. Star Coal Co.*, 110 Iowa 110.

In this case it is said in the opinion: "Now, while it is almost universally held that evidence of custom is not admissible to excuse negligence, yet it is admissible in certain cases to prove negligence. In the case before us the general rule, no doubt, is that the master must provide the servant with a safe place in which to work, but, as the servant is from time to time making the place for himself, the law does not fix the exact time when his duty to look after himself

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ceases, and that of the master begins. Evidence as to the usage or custom in mines in that particular district with reference to the time when the duty of the master respecting the care of the roof begins was properly admitted. Until a duty arose with respect to the roof, there would be no negligence on the part of the master, and as the law does not attempt to fix the exact period when that duty commenced, evidence as to custom was clearly admissible. *Bergquist v. Iron Co.*, 49 Minn. 511, 52 N. W. 137; *Whitsett v. Railroad Co.*, 67 Iowa 150, 25 N. W. 104; *Coates v. Railway Co.*, 62 Iowa 486, 17 N. W. 760; *Hamilton v. Railroad Co.*, 36 Iowa 36; *Couch v. Coal Co.*, 46 Iowa 17; *McKean v. Railroad Co.*, 55 Iowa 192, 7 N. W. 505; *Bailey, Master's Liability*, p. 31.

Sufficiency of Train Crew—Custom of Other Railroads.—In *Railway v. Reed*, 88 Tex. 439, 31 S. W. 1058, it is held, on the issue of negligence in failing to provide a sufficient train crew, that evidence as to the custom of other railroads may be admitted as tending to show that the crew in question was not sufficient.

Switch Devices—Usage of First-Class Railroads.—In an action for injuries to an employee, alleged to have resulted by his company's use of switch devices of a certain construction, what was the general usage of first-class railroads with respect to the construction of such switch devices was a pertinent question. So held in *Indiana, I. & I. R. Co. v. Bundy (Ind.)*, 14 Am. & Eng. R. Cas., N. S., 660.

Injury to Saw Mill Hand—Covering Gearing—Custom in Other Mills.—In an action for injury to a saw mill hand, caused by his leg being caught in certain gearing, evidence that it was customary in other mills to cover such gearing was competent on the issue of defendant's negligence in not covering it in his mill. So held in *Nadau v. White River Lumber Co.*, 76 Wis. 120, 43 N. W. 1135.

Injury to Car Repairer—Escape of Car from Switch Track—Absence of Derailing Switch—Device in Common Use.—In an action for injury to a car repairer by a car escaping from a switch track onto the track where he was at work, it was competent to show the absence of a derailing switch at the junction of the switch track and the other track, and that such a device was in common use by defendant. So held in *Smith v. Fordyce (Mo.)*, 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378, 88 S. W. 679.

Trainman Struck by Stock Gap While Leaning Out of Car—Care Exercised by Well-Regulated Railroads.—The failure of a railroad to furnish stock gaps such as are furnished on well-regulated railroads generally does not, as a matter of law, establish the charge of negligence in an action to recover for the death of an employee, caused by decedent being struck by a stock gap while leaning out from a car to watch a hot box thereunder, though as evidence of what, in the exercise of due care, ought to have been done in the maintenance and construction of the roadway, it is proper to consider the usage prevailing on other well-regulated railroads. So held in *Northern Ala. Ry. Co. v. Mansell (Ala.)*, 11 R. R. R. 186, 34 Am. & Eng. R. Cas., N. S., 186, 36 So. 459.

Death of Quarry Hand—Drag-Ropes—How Supported in Other Quarries.—In an action for the death of a stone quarry employee, caused by his being struck by a swinging drag-rope and knocked off the ledge on which he was working, plaintiff could show the manner in which such drag-ropes were supported in other quarries to prevent their swinging, in order to aid the jury in determining whether the defendant had exercised reasonable care in the arrangement of the drag-rope in question. So held in *Belleville Stone Co. v. Comber*, 61 N. J. L. 353, 39 Atl. 641.

Injury to Miner—Safe Place to Work—Whether Duty of Master or Servant—Usage.—In an action for injury to a miner, evidence of custom and usage as to whether it was the duty of the master or servant to care for the safety of the place of work is not inadmissible

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as varying a rule of law, or, in the absence of stipulations, any contract relation between the parties. So held in *Thayer v. Smokey Hollow Coal Co.*, 121 Iowa 121.

Injury to Car-Coupler—Duty to Look for Obstructions—Rule Among Railroad Men.—But evidence is inadmissible, on the issue of the contributory negligence of a brakeman in making a coupling, that it was a rule among railroad men that a brakeman must look where he goes to couple cars, the question being for the jury. So held in *Gulf, C. & S. F. Ry. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475.

Personal Injuries—Negligent Order—Proper Method of Unloading.—And in an action for personal injuries based on negligence in giving an order in regard to unloading timbers from a car, testimony as to the proper method of unloading the timbers is admissible, but only for the purpose of illustrating the negligence in giving the order. So held in *Cleveland, etc., Ry. Co. v. Hall*, 70 Ill. App. 429.

Custom in Other Factories to Guard Dangerous Device—Assumption of Risk.—And in an action for injuries to an employee, caused by his coming in contact with a machine having a dangerous device, while employed in defendant's factory, evidence of a custom in other factories using similar machines to guard the device was immaterial in view of the employee's implied contract to work with the machinery which his master was using at the time he entered his service. So held in *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836.

Injury to Employee—Moving Trains—Signals—Rules of Three Railroads.—And in an action for injury to an employee, evidence as to the rules of three particular railroads on the subject of ringing bells and giving signals by engineers when moving or about to move their engines is inadmissible to prove a general custom by which to determine the issue of negligence of another railroad company. So held in *St. Louis & San Francisco Ry. Co. v. Nelson*, 20 Tex. Civ. App. 536, 49 S. W. 710.

Injury to Alighting Passenger—Evidence as to Usage as to Trains Entering Station.—In *Floytrup v. Boston & Maine R. Co.*, 2 Am. & Eng. R. Cas., N. S., 273, 163 Mass. 152, 39 N. E. 797, it is held that evidence of the usage of a railroad company that one train should not enter a station while another train was engaged in delivering passengers there is competent upon the question whether the company's servants properly managed the train.

Injury to Passenger—Unguarded Elevated Railway Platform—Usual Construction.—In an action for injuries to an intending passenger from a fall from the unguarded end of an elevated railway station, platform, evidence was admissible to show that such structures are or are not, generally constructed in a similar manner. So held in *Jarvis v. Brooklyn El. R. Co. (City Ct.)*, 16 N. Y. Supp. 96.

A. R. Y.

SOUTHERN RY. CO. v. VAUGHN.

(Supreme Court of Mississippi, May 22, 1905.)

[38 So. Rep. 500.]

Initial Carrier's Liability—Termination.*—Where freight is delivered by the initial carrier in good condition and without unreasonable delay to a connecting carrier for shipment to destination, the liability of the initial carrier on account of the shipment ceases.

Instruction Not Warranted by Evidence.—In an action against a

*See foot-note appended to *Johnson v. Toledo, S. & M. Ry. Co. (Mich.)*, 8 R. R. R. 137, 31 Am. & Eng. R. Cas., N. S., 137.

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carrier for the value of a machine shipped over its lines, where the evidence was uncontradicted that the defendant delivered the machine to its connecting carrier in good condition and without unreasonable delay, a charge which permitted the jury to find for the plaintiff if defendant negligently failed to deliver the machine to the connecting carrier was erroneous.

Appeal from Circuit Court, Webster County; J. T. Dunn, Judge.

Action by M. A. Vaughn against the Southern Railway Company, brought in a justice of the peace court and appealed to the circuit court by defendant. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This was a suit brought in a justice of the peace court by appellee against appellant for the value of one sewing machine valued at \$58, shipped by appellee on December 21, 1901, from Eupora, Miss., consigned to M. A. Vaughn, Caddo, Indian Territory. From judgment for plaintiff, defendant appealed to the circuit court. The court refused a peremptory instruction for defendant. From verdict and judgment for plaintiff, defendant appeals. The opinion of the court contains a statement of such other facts as is necessary for an understanding of the case.

A. F. Fox, for appellant.

N. W. Bradford, for appellee.

TRULY, J. The affidavit for a continuance filed by the appellant recited that it expected to prove by certain witnesses, whose depositions had been delayed, that the identical machine forming the basis of this litigation was at that date in the possession of the agent of the Memphis, Kansas & Texas Railway Company at Caddo, Indian Territory, to which place it was shipped (from Eupora on 21st December, 1901), and that it arrived there on January 18, 1902. Further, that said machine was received at Memphis, Tenn., in December, 1901, and by the agent of the Southern Railway Company "turned over to the Choctaw, Oklahoma & Gulf Railroad in good condition, and without unreasonable delay, for shipment to Caddo, Indian Territory." The record recites that "the plaintiff admitted that the witness mentioned in said affidavit would testify as recited in said affidavit, and agreed that said affidavit might be read in the trial as if the testimony was produced in open court."

It is conceded that, if the appellant transported the machine and delivered the same to its connecting carrier without unreasonable delay and in good condition, its responsibility for the shipment ceased, so far as this suit is concerned, with said delivery. This is expressly recognized by the instruction granted for appellee, which predicates recovery solely upon the theory that the railroad company negligently failed to deliver the machine to its connecting carrier. The same legal proposition is correctly stated in the instruction granted to appellant. But in the face of the express and uncontradicted admission as to the prompt transportation and delivery in good order by appellant,

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there was no conflict of testimony as to the vital point in the case, no proof of any negligence on the part of the appellant, and consequently nothing on which to base an instruction. Wherefore it was error to refuse the peremptory instruction asked by the appellant.

Reversed and remanded.

STATE ex rel. COWLEY COUNTY ATTY. v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, June 10, 1905.)

[81 Pac. Rep. 212.]

Diseased Animals—Transportation.*—Cattle driven into Kansas for immediate slaughter from any point south of its south line and carrying southern ticks are deemed by statute to be infected with and capable of communicating Texas, splenic, or Spanish fever, and such animals cannot be so transported into the state in the absence of rules regulating their admission, to be prescribed by the live stock sanitary commission.

Same—Injunction—Nuisance.*—A railway company which maintains a lane or passageway for the driving of infected cattle from the Indian Territory into this state, under circumstances mentioned in the first paragraph of this syllabus, may be enjoined in an action brought by the state to abate a public nuisance.

Same—Statutory Regulation.—Sections 7451, 7452, Gen. St. 1901, construed and applied.

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by the state, on the relation of the county attorney of Cowley county, against the Missouri Pacific Railway Company to enjoin a nuisance. Judgment for defendant, and the state brings error. Reversed.

C. C. Coleman, Atty. Gen., J. E. Torrance, and S. C. Bloss, for plaintiff in error.

J. H. Richards, C. E. Benton, and G. H. Buckman, for defendant in error.

WM. R. SMITH, J. This was a suit brought by the state of Kansas, on relation of the county attorney of Cowley county, to enjoin the Missouri Pacific Railway Company from maintaining a nuisance in violation of the live stock sanitary laws of the state. The petition was filed July 7, 1904. For several years the railway company has maintained a cattle shipping station named "Davidson" on its line of road in Cowley county, situated about two miles north of the Indian Territory line. From its stock-

*For the authorities in this series on the subject of the transportation of infected live stock, see note, 4 Am. & Eng. R. Cas., N. S., 630 (constitutionality of statutes prohibiting the transportation of diseased live stock); Davis v. Texas & P. R. Co. (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 426 (statute applicable only to interstate shipments); Missouri, K. & T. Ry. Co. v. Haber (U. S.), 13 Am. & Eng. R. Cas., N. S., 37 (right to enforce Kansas statute).

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yards at that place the company laid out and maintained a lane, bounded on either side by a wire fence, extending two miles south to the Kansas state line, and opening into a pasture in the Indian Territory. This passageway is maintained for the purpose of allowing prospective shippers to drive herds of cattle from south of the quarantine line into Kansas for shipment. There was testimony introduced at the trial tending to show that herds of southern cattle were driven up the lane; also cows to coax the calves along; that the cows were permitted to wander back to the Indian country after the calves were loaded on cars for shipment; that splenic fever is caused by ticks which fall from southern cattle and either fasten themselves on native animals or hatch out small ticks, which do; that southern cattle driven up this lane had communicated fever to native cattle the year before the action was tried. None of the cattle driven into this state was ever inspected nor any bill of health issued in respect to them. It was shown that 450 head of southern cattle were shipped from Davidson in June, 1904, over the line of defendant in error, consigned to the National Stockyards at East St. Louis, Ill.

The gravamen of the complaint against the railway company appears in the following extract from the petition: "Defendant, if permitted to continue the introduction of said cattle into Kansas from the infected districts aforesaid, in the manner aforesaid, is liable by reason of the escape of the said cattle through the fences of said lane and by coming in contact with the native cattle along and adjacent to said lane to infect the native cattle of that immediate vicinity with Texas fever, and spread and scatter the same throughout the county, to the great damage and detriment of the citizens of this county, by reason of which said railway company in the manner and form aforesaid has been maintaining and is now maintaining and threatened and is about to continue a public nuisance within the county of Cowley and state of Kansas." A trial before the court resulted in a judgment favorable to defendant below. The state has prosecuted proceedings in error.

The following sections of the statute have application to the question involved (Gen. St. 1901, §§ 7451, 7452):

"All cattle being at or brought from any point south of the south line of the state of Kansas, and carrying *Boophilus bovis*, or southern ticks, are deemed to be infected with and capable of communicating Texas, splenic or Spanish fever, and such cattle shall not be shipped or transported into the state of Kansas except for immediate slaughter, and then only under such rules and regulations as may be prescribed by the live stock sanitary commission."

"It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the state of Kansas, except for immediate slaughter, as provided in the preceding section, from any point south of the south line of Kansas, without

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having first caused such animal or animals to be inspected and passed under certificate of health by the live stock sanitary commission of this state or some inspector thereof; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment."

Acting under the provisions of section 7434, Gen. St. 1901, the live stock sanitary commission determined that quarantine regulations were necessary to prevent infectious diseases among domestic animals, and notified the Governor of the fact. The latter, on June 2, 1904, issued a proclamation that cattle brought from points south of the thirty-seventh parallel of north latitude, or west of the west line of Kansas, were infected with and capable of communicating splenic or Spanish fever, or a disease known as "itch" or "mange," to Kansas herds, when imported into the state, and establishing a quarantine against all such cattle, and proclaimed that "all cattle hereafter brought, shipped or transported through the state of Kansas shall be admitted only under such rules and regulations as are or shall hereafter be provided and adopted by the live stock sanitary commission of this state." Rule 8 of the live stock sanitary commission reads: "Any persons desiring to avail themselves of the passage of cattle for slaughter purposes from points south of the south line of Kansas, without inspection and the payment of fees, may do so by consigning them to the quarantine pens of whatever market they may be destined, but under no condition shall they be unloaded in native chutes or native pens of Kansas unless they are accompanied by a certificate of health issued by a Kansas inspector. Also cattle destined for points beyond the limits of Kansas may unload for feed and rest without state inspection or payment of fees at any shipping yards on lines of road on which they are being shipped, provided each and every shipment is accompanied by a certificate of health issued by an agent of the Bureau of Animal Industry; otherwise shall be accompanied by a certificate issued by a Kansas inspector." Another rule of the commission provides that each car carrying cattle from the infectious area into or through the state must have a placard attached thereto stating in bold letters, "This car contains southern cattle," and the way-bill stubs shall have marked plainly on the face thereof the words, "Southern cattle."

It will be observed that section 7451 of the statute, *supra*, declares cattle brought from the south line of Kansas and carrying southern ticks are deemed to be infected with and capable of communicating Texas, splenic, or Spanish fever, and such cattle shall not be shipped or transported into the state, except for immediate slaughter, "and then only under such rules and regulations as may be prescribed by the live stock sanitary commission." The next section of the statute (7452) prohibits the

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driving or transporting any cattle into any county of the state, except for immediate slaughter, "as provided in the preceding section," from any point south of the south line of Kansas, without an inspection and obtaining a certificate of health from the sanitary commission or some inspector thereof. Reading together the two sections of the statute last referred to, it seems clear that cattle transported into the state for immediate slaughter cannot be brought here for such purpose unless permitted by the rules and regulations of the live stock sanitary commission. Rule 8, above quoted, has reference to transporting by railroad. This is apparent from the regulation in the rule respecting the unloading of animals, which by no possibility could have application to cattle on foot. It is conceded that there is no rule of the commission respecting the driving of cattle into or through the state. It is the contention of the railway company that, it being lawful to drive cattle into the state for the excepted purpose, namely, for immediate slaughter, by failing to act in the matter of making rules the live stock commission cannot make that act a crime which the statute authorizes. A careful reading of the law, however, will disclose that cattle brought into Kansas can only come here under such rules and regulations as the commission may prescribe even for the excepted purpose. This is the clear meaning of section 7451, *supra*, and section 7452 makes it unlawful to drive cattle into Kansas "except for immediate slaughter," with the added phrase, "as provided in the preceding section."

There being an absolute inhibition in the law against the driving of cattle into the state from infected districts unless the live stock sanitary commission shall promulgate rules and regulations as to their inspection, a failure of the commission to act in that respect and to make rules and regulations must be regarded as a determination by it to exclude all cattle attempted to be driven into the state from such districts. If, as contended by counsel for the railway company, any and all cattle may be driven into the state for immediate slaughter from points south of the state line without inspection, an infected herd may be driven lawfully from the north line of the Indian Territory to Topeka or Kansas City, Kan., for slaughter, threatening with deadly inoculation all the native cattle contiguous to the roads over which they might pass. Such is not the spirit, letter, or intention of the law. If southern cattle can be driven lawfully two miles into the state, the driving of them a distance of one or two hundred miles would be equally permissible.

The objection that the acts of defendant below in maintaining the cattle trail did not constitute a public nuisance is ill founded. To place in jeopardy the animal industry of a state where stock raising is one of the principle sources of wealth is a matter of concern to all. A menace of such nature should be met with prompt preventive measures by those charged with the duty of enforcing the laws.

The judgment of the court below will be reversed, with directions to proceed further in accordance with this opinion. All the Justices concurring.

AMMONS *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 26, 1905.)

[51 S. E. Rep. 127.]

Railroads—Rule Requiring Purchase of Tickets before Entering Cars.*—A rule of a railroad company requiring passengers to procure tickets before entering the cars is reasonable.

Same—Enforcement of Rule.*—The rule may be enforced either by ejecting from the train a passenger without a ticket, regardless of a tender by him of the fare in money, or by requiring the payment of a larger fare on the train than that charged for a ticket.

Same—Conditions Precedent to Enforcement—Facilities for Purchasing Ticket.*—In order to entitle the railroad to enforce the rule by ejection from the train or by exacting a larger fare, it must have afforded the passenger reasonable facilities to purchase the required ticket.

Same—Failure to Supply Tickets for Sale—Knowledge of Conductor—Action for Wrongful Expulsion from Train—Submission to Jury—Error.*—In an action against a railroad for wrongfully ejecting plaintiff from one of its trains, plaintiff testified that, on applying for a ticket, defendant's agent told him he was out of tickets, but to board the train, and he would tell the conductor not to charge plaintiff extra fare; defendant's rule requiring the payment of 25 cents extra when a passenger has no ticket. The conductor refused to accept plaintiff's statement that the agent had no tickets, and ejected him from the train on his refusal to pay extra fare. Held, that plaintiff's right of recovery did not depend on the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale, and refusal to submit the case to the jury under proper instructions was error.

Appeal from Superior Court, Swain County; Long, Judge.

Action by W. R. Ammons against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. New trial.

The plaintiff alleges that he was unlawfully ejected from one of the defendant's trains, and sues to recover damages for the wrong thus committed. At the close of the testimony, and after the plaintiff had requested certain instructions to be given to the jury, the court held that he could not recover in the action. The plaintiff thereupon submitted to a nonsuit, and appealed. It is necessary to state only the substance of his testimony, which is as follows: On June 20th the plaintiff went to Almond, a

*See *Ford v. East Louisiana R. Co.* (La.), 8 R. R. R. 229, 31 Am. & Eng. R. Cas., N. S., 229 (right to pay fare in cash); note, 2 Am. & Eng. R. Cas., N. S., 24 (right to eject for failure to procure ticket). Right to charge extra fare for failure to procure ticket, see *Kennedy v. Birmingham Ry. L. & P. Co.* (Ala.), 9 R. R. R. 700, 32 Am. & Eng. R. Cas., N. S., 700; foot-note appended to *Monnier v. New York Cent. & H. R. R. Co.* (N. Y.), 8 R. R. R. 187, 31 Am. & Eng. R. Cas., N. S., 187.

As to duty of conductors to respect explanations of passengers as to cause of failure to have tickets, see foot-note appended to *Marks v. Louisiana Western R. Co.* (La.), 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

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station on defendant's line, to buy a ticket to Noland, which is nine miles away. The defendant's agent told him he was out of tickets, but to get on the train, and he would tell the conductor not to charge extra fare. The agent said the ticket rate was 41 cents. The extra or train rate was 65 cents. The agent said the plaintiff would have to pay only 41 cents. He boarded the train, and the conductor asked him for his ticket. The plaintiff told him what the agent had said to him, and the conductor demanded 75 cents, and said that the agent did have tickets. He then told the plaintiff to pay 75 cents or get off. He pulled the bell cord, when the plaintiff said, "If you put me off, I will sue the company," and the conductor replied, "It would not make a darn bit of difference to me if you did." When the conductor called for the fare, the plaintiff offered him 50 cents, and added that he did not mind a rebate, but did not want to pay 75 cents. The conductor refused to take the 50 cents, and put the plaintiff off the train 400 yards from the station. It is a rule of the company to require the payment of 25 cents extra when a passenger has no ticket. There was evidence as to the damages, not necessary to be stated.

A. J. Franklin and F. C. Fisher, for appellant.

Moore & Rollins and A. B. Andrews, Jr., for appellee.

WALKER, J. (after stating the case). Assuming the plaintiff's testimony to be true, and giving him the benefit of all reasonable inferences therefrom—and this is the way it should be considered—we think the judge erred in his intimation of opinion against the plaintiff's right to recover. The law of the case, at least in the present development of the latter, and in the aspect of it now presented, seems to be well settled, and is thus stated by a learned and accurate text-writer: "It is undoubtedly competent for a railroad company, as a means of protection against imposition, and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car; and where this requirement is duly made known, and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train, regardless of a tender of the fare in money, or by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured. A regulation or by-law of the carrier is not unreasonable which provides that when such tickets are not procured before the commencement of the journey, and the carrier is therefore put to the inconvenience of collecting from the passenger his fare during its progress, the price of the carriage shall be more than would have been charged for the ticket, and that upon the refusal of the passenger to pay the higher fare, not extortionate in amount, he shall be ejected. And if adopted in good faith, and with a view to facilitate the business of the carrier, there can be certainly nothing unreasonable or unjust in such rule, especially in the case of railway carriers. But, as a condition precedent to the existence of this right of expulsion for the refusal to pro-

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cure a ticket or to pay the higher fare, an opportunity, at least reasonable, and such as the statute requires where a statute exists, must have been afforded by the carrier to the passenger, not himself in fault, to provide himself with the required ticket. If, therefore, no office be kept or opened at the proper time, nor adequate facilities be provided for the purpose of supplying passengers with them, or if the office provided for the purpose be closed before the time fixed by law or by a rule of the carrier, and for either reason the passenger has been unable to obtain a ticket, the higher rate cannot be lawfully demanded. And if, without having afforded such proper facilities to the passenger, the carrier should exact from him the additional charge for carriage without a ticket, the former may sue for and recover the amount so paid above the established rate when a ticket is purchased; and if, upon his refusal to pay it, he be ejected, when he is ready and offers to pay his fare at such established rate, his expulsion will be illegal, and he may recover damages for the trespass." Hutchinson on Carriers (2d Ed.) § 570 et seq.; 5 Am. & Eng. Enc. of Law (2d Ed.) p. 595, and note 4. In his work on Carriers, at section 269, Fetter thus states the doctrine: "By the overwhelming weight of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who, without fault on his part, boards the train without such a ticket, will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare. So it has been held that the fact that the company agrees to refund the excess of train fare on presentation of the conductor's receipt or check at a regular station does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance. It cannot be justly said that it is reasonable to require the passenger to pay more than a regular rate on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts." These principles are well sustained by the authorities cited in their support, and are in themselves most just and reasonable. They apply with peculiar force to the facts of this case.

The plaintiff's right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the facts that the agent had no tickets for sale to intended passengers. If he did not know it, and refused to accept and act upon the plaintiff's statement, no fault can be imputed to the plaintiff, and the defendant cannot escape liability, as the cause of action rests upon the fact that there was no opportunity afforded to purchase a ticket, and the plaintiff is not responsible, and cannot be made to suffer, for the conductor's ignorance of existing conditions.

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The defendant's station agent could easily have informed the conductor that his tickets had been exhausted, and actually promised the plaintiff to do so, so that in this case there was no excuse for a want of knowledge of the facts. It is sufficient to declare, in the light of the authorities and with the plaintiff's testimony before us, that he was entitled to have the case submitted to the jury under proper instructions from the court. Having so decided, we need not discuss the question of damages. The subject, though, has recently been considered by this court in the following cases: *Holmes v. Railroad*, 94 N. C. 318; *Rose v. Railroad*, 106 N. C. 168, 11 S. E. 526; *Tomlinson v. Railroad*, 107 N. C. 327, 12 S. E. 138; *Allen v. Railroad*, 119 N. C. 710, 25 S. E. 787; *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917. There was error in the ruling of the court that the plaintiff upon his own showing was not entitled to recover.

New trial.

WELCH v. NORTHERN PAC. RY. CO.

(Supreme Court of North Dakota, Dec. 16, 1904.)

[103 N. W. Rep. 396.]

Carriers—Limiting Liability.*—A contract between a common carrier and a shipper of stock, drawn by the common carrier, and for his benefit, so far as limiting his liability is concerned, is to be construed liberally in favor of the shipper.

Judgment Notwithstanding Verdict—Variance.—A judgment notwithstanding the verdict will not be upheld, under chapter 63, p. 74, Laws 1901, on the ground merely that there was a variance between the cause of action stated and the proof adduced. It must further appear that no amendment of the complaint can properly be made.

Same.—A judgment notwithstanding the verdict will not be sustained, under chapter 63, p. 74, Laws 1901, on the ground that there was a failure of proof as to some essential element of the cause of action. It must further reasonably appear that such defect of proof cannot be supplied on another trial.

(Syllabus by the court.)

Appeal from District Court, Walsh County; W. J. Kneeshaw, Judge.

Action by Frank Welch against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

E. R. Sinkler, for appellant.

Ball, Watson & Maclay, for respondent.

MORGAN, C. J. The complaint in this action alleges that the defendant negligently failed to comply with its duty as a common carrier on a shipment of two car loads of sheep from St. Paul, Minn., to Grafton, N. D. The negligence charged is (1) overloading the cars; (2) delay in delivering the sheep, by reason of which

*See *Adams Exp. Co. v. Carnahan* (Ind. App.), 3 R. R. R. 677, 26 Am. & Eng. R. Cas., N. S., 677.

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they were not delivered at Grafton until 56 hours after loading, the usual time required to transport such property between said places being from 24 to 30 hours; (3) failure to feed and water the sheep while on the road. The answer sets forth the following affirmative defenses in addition to a general denial: (1) That the sheep were carried by the defendant between said places under a written contract stipulating that the defendant was not to be held liable for any damages for its failure to comply with said contract unless such damages were immediately caused by the misconduct or the actual negligence of the defendant, its agents, servants, or employees; (2) that plaintiff failed to comply with a stipulation of said contract providing that plaintiff should give notice in writing to some officer or station agent of said company of any damage claimed for breach of said contract before said sheep should be removed from the place of destination or mingled with other stock; (3) that any damages to plaintiff's sheep on said shipment under said contract were caused by plaintiff's misconduct and negligence. The jury returned a verdict in plaintiff's favor for the sum of \$454. Upon the rendition of such verdict, the defendant moved for judgment notwithstanding the verdict upon the grounds stated in a motion for a directed verdict, which had been denied. These grounds were (1) insufficiency of the evidence to justify a verdict in plaintiff's favor; (2) failure to comply with the conditions imposed by the contract on plaintiff; (3) variance between the cause of action stated in the complaint and the proof relied on to sustain the cause of action.

Before the motion for judgment notwithstanding the verdict was granted, the plaintiff asked leave to amend the complaint in several particulars. Among the amendments asked was one alleging that the sheep were shipped under the written contract which had been received in evidence; that plaintiff had complied with all the conditions of the same; and another amendment was asked to the effect that the caboose on which the plaintiff was riding had been negligently separated from the cars in which the sheep were being carried, and that in consequence thereof the plaintiff was not able to care for such sheep for about 20 hours, and that they were damaged in consequence of not having been fed and watered during that time. The amendment asked further alleged that the defendant negligently refused to furnish facilities for feeding and watering said sheep during said shipment. On objection made, the court refused to allow the amendment.

The only question raised on the appeal is whether it was error to grant the motion for judgment notwithstanding the verdict. On the part of the respondent it is claimed that the evidence shows that the plaintiff is not entitled to recover under any circumstances, as a matter of law. He insists that, the plaintiff having alleged as his cause of action a common-law contract of carriage, he cannot recover under a special contract in writing, without having pleaded such special contract; that the defendant is entitled to the benefit of the conditions of such written contract limiting its liability under some circumstances, and imposing upon

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the plaintiff certain duties in reference to the performance of the contract that were not fulfilled by him. Defendant especially insists that the plaintiff is precluded from ever recovering judgment in the case, for the reason that he neglected to serve notice upon the defendant of damages to the sheep caused by defendant's negligence during the shipment, "before said stock had been removed from the place of destination or mingled with other stock," as provided by the contract. The evidence fails to show a violation of this requirement. It is shown that the sheep were not removed beyond the limits of Grafton before the notice in writing was served, and it is also shown that the sheep were not mingled with other sheep until a long time after the notice was served. This provision was made a part of the contract for the benefit of the defendant, and the contract was drawn by the defendant. Such a contract limiting the liability of common carriers is construed strictly against the carrier. To construe the contract so that the word "destination" would mean the premises of the defendant where the sheep were unloaded would be too strict, and not in harmony with the rule that the shipper is entitled to a liberal construction of such contracts in his favor. *Cream City Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267; *Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

It is also claimed by the defendant that plaintiff can in no event recover in an action on this contract, for the reason that it provides that the shipper was to feed and water the sheep while being transported. The contract does so provide. Plaintiff offered to show, and asked to have the complaint amended to allege, that, through the negligence of the defendant, it was rendered impossible for the plaintiff to feed the sheep, as they were carried several miles from where he was left, and they so remained for 20 hours, during which time the sheep were not fed or watered. Plaintiff further offered to amend his answer, and to prove that the defendant refused to furnish facilities for watering and feeding the sheep during the 56 hours they were kept in the cars. We think it was error to refuse to allow the plaintiff to show these facts, and, if necessary, to amend the complaint so as to make such facts admissible. The question is only mentioned as bearing upon the right of the defendant to judgment notwithstanding the verdict. It is well settled that a common carrier must provide facilities and opportunity for feeding and watering stock during transportation, in cases where the shipper agrees in the contract to feed and water them. The carrier is only absolved by such a contract from attending to the additional work of feeding and watering, but is not excused from affording the shipper the opportunity of so doing whenever it becomes reasonably necessary. A negligent failure to do so renders the carrier liable, if damages result directly from such failure. 6 Cyc. p. 438; A. & E. Enc. of Law, vol. 5, p. 440; *Smith v. Michigan Central Ry. Co.* (Mich.) 58 N. W. 651, 43 Am. St. Rep. 440; *Burns v. Chicago, M. & St. P. Ry. Co.*, 104 Wis. 646, 80 N. W. 927; *Grieve v. Illinois Central Ry. Co.*, 104 Iowa, 659, 74 N. W.

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192; Taylor, B. & H. Ry. Co. v. Montgomery (Tex. App.) 16 S. W. 178; Elliott on Railroads, vol. 4, § 1549.

The omission to plead the refusal to provide facilities for feeding and watering could in no case be ground for granting a motion for judgment notwithstanding the verdict. If the complaint is susceptible of amendment to supply an insufficient statement of a cause of action, the amendment must be allowed; and a judgment notwithstanding the verdict, rendered on a defective pleading, or upon evidence that is deficient in some particular, will be upheld. The pleading must be deficient to the extent that no amendment thereof can be made, before a party can be deprived of his right to have a jury pass upon the facts that would be admissible if the pleadings were amended. A variance between the cause of action set forth and the proof adduced under it does not justify a judgment notwithstanding the verdict in such cases. A new trial may be granted in such case, or a verdict directed, but a party cannot be deprived of a right to amend the pleadings on a new trial by a summary judgment under the provisions of chapter 63, p. 74, Laws 1901, authorizing a judgment notwithstanding a verdict. The same rule is applicable upon failure of proof in reference to a fact not proven, without which the cause of action is not established. Before a judgment can be properly ordered under that chapter, it must reasonably appear that the defect in proof cannot be remedied if a new trial be granted. This is the rule established in this state by several decisions, and in Minnesota, from which state the statute was taken. *Richmire v. Elevator Co.*, 11 N. D. 453, 92 N. W. 819; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299; *Ætna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Meehan v. Great Northern Ry. Co.*, 13 N. D. —, 101 N. W. 183; *Marquardt v. Hubner* (Minn.) 80 N. W. 617; *Cruikshank v. Insurance Co.* (Minn.) 77 N. W. 958; *Merritt v. Railway Co.* (Minn.) 84 N. W. 321.

The plaintiff declared upon a cause of action based on the common-law liability of the defendant as a common carrier. It was established on the trial that, if any liability arose, it was upon a special contract of shipment, in which the defendant's liability was limited. But it does not appear that plaintiff has no cause of action upon the contract, if properly pleaded.

Inasmuch as a motion for a new trial was not joined with the motion for judgment notwithstanding the verdict, the question as to whether the defendant's right to move for a new trial still exists, or whether a new trial ought to be granted if a motion to that effect is made in time, is not before us on this appeal.

Reversed. All concur.

BREZEWITZ v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, April 29, 1905.)

[87 S. W. Rep. 127.]

Contract of Connecting Carrier to Send Instructions for Delivery of Ticket—Degree of Care—Delay on Part of Initial Carrier—Liability. —Where plaintiff's father paid defendant's ticket agent a sum of money for a ticket for plaintiff over the line of defendant and another, the other carrier being the initial one, and the ticket agent agreed to telegraph instructions for delivery of the ticket to plaintiff, defendant was only bound to use reasonable promptness in forwarding the instructions, and was not liable for delay of the other carrier in delivering the ticket after receipt of the instructions.

Directing Passenger to Ride in Smoker—Sickness—Liability. —Where a passenger, when about to take his train, was directed by a porter to ride in the smoker, and he did so without having appealed to the conductor for any other quarters, he could not recover damages for sickness caused by riding there.

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by Arnold S. Brezewitz, by his next friend, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action brought in the circuit court of Miller county on behalf of appellant, a minor, by his father, as next friend, against appellee for damages. It is alleged in the complaint and shown by proof that appellant resided at Texarkana, Ark., and was a student in school at Annapolis, Md., preparatory to entering the United States Naval Academy. After failing to pass the physical examination at the academy, he notified his father at Texarkana of his desire to return home immediately. This was on September 8, 1898. On the same day his father applied to the local ticket agent of appellee at Texarkana, and paid to him the price of a first-class ticket from Annapolis to Texarkana, and the latter agreed to telegraph instructions for delivery of the ticket to appellant at Annapolis. The ticket agent executed and delivered to appellant's father a written receipt for the sum so paid for the ticket, reciting that the sum paid was "for one first-class ticket to be furnished to Arnold Brezewitz from Annapolis, Md., to Texarkana, Ark." The ticket was not delivered to appellant until September 12th or 13th, about 6 o'clock in the evening, too late for him to get a train out that day, and he left Annapolis the next day. The ticket was over the Baltimore & Ohio Railroad from Annapolis to St. Louis, and thence over appellee's road to Texarkana. Appellant testified that on his arrival at St. Louis, where he changed to appellee's train in the Union Station at that place, the porter of appellee's train directed him to enter the smoking car, in which he rode from St. Louis to Texarkana; that he did not use tobacco, and was made sick from the continuous ride in the atmosphere laden with tobacco smoke and other foul odors. Damages were claimed on account of loss of

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time in waiting at Annapolis for the ticket and the physical and mental pain resulting from the enforced ride in the smoking car. It was proved by appellee's employees, and not disputed, that immediately upon making the agreement with appellant's father to deliver the ticket to his son the ticket agent, by telegraphic message sent to appellee's general passenger agent at St. Louis, and thence transmitted to the ticket agent of the Baltimore & Ohio Railroad Company at Annapolis, caused a ticket to be delivered to appellant. The message was received by the general passenger agent of appellee at St. Louis on September 8th, and on the same day he sent the following telegraphic message to the manager of passenger traffic at Baltimore, Md., of the Baltimore & Ohio Railroad Company, viz.: "Please furnish Arnold S. Brezewitz, care of R. L. Wernz, one first class limited ticket, Annapolis to Texarkana, Tex. via your line B. & O. S. W. and our line, Rush delivery. Advise description of ticket. Will send prepaid order for \$30.85 to cover." The message was received at 7:09 p. m. on September 8th, and at 9 a. m. the next day a message was sent by the last-named official to the local agent of the latter company at Annapolis, directing him to deliver the ticket to appellant. On the trial the court gave all the instructions asked by each party. A verdict was returned by the jury in favor of the defendant, judgment was entered accordingly, and the plaintiff appealed from the decision of the court overruling his motion for a new trial.

Oscar D. Scott, for appellant.

B. S. Johnson and *J. E. Williams*, for appellee.

McCULLOCH, J. (after stating the facts). Appellant claims that appellee fell short in its duty to him in two respects, and is liable in damages therefor, viz., in failing to cause the ticket to be delivered to him at Annapolis in due season, and in directing him to the wrong car at St. Louis. The first question was submitted to the jury by the court upon instructions that if appellee's agents, with reasonable promptness, transmitted the order to the Baltimore & Ohio Railroad Company for delivery of the ticket to appellant, that was sufficient compliance with its contract, and that appellee was not responsible for the failure of the latter company to promptly deliver the ticket. We think that instruction was correct. Conceding that it was within the scope of the authority of appellee's local ticket agent at Texarkana to execute the contract in question, it was, in effect, only an agreement to transmit the order for the ticket to the initial carrier. It did not amount to an undertaking that the seller of the ticket would deliver it to appellant. It is not contended that appellee assumed to carry passengers from Annapolis to Texarkana. The ticket was to be furnished by another carrier, over whose line appellant was to travel to St. Louis, where appellee's line terminated; and under the agreement the first carrier cannot be treated as the agent of appellee for the purpose of delivering the ticket. All that the parties could have had in contemplation at the time of

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the agreement was that appellee's agent should transmit to the initial carrier at Annapolis instructions to deliver the ticket to appellant. This they did with reasonable promptness, and appellee cannot be held responsible for delay of the other carrier in delivering the ticket after receipt of the instructions.

Appellant testified as follows: "When I arrived at St. Louis, preparatory to departing south for this place, I went through the gate, and tried to get on the chair car next to the sleeper, and the porter said 'Go to the forward car, next to the baggage car.' The porter saw my ticket. I obeyed orders, and went to the smoker, the one next to the baggage car, the one he directed me to, and rode in it to Texarkana. At that time I did not use tobacco. The effect of being in a place where it was used was sickening, made me sick at the stomach. It was in obedience to orders that I went there and rode to Texarkana in it. There was smoking in there all the way. * * * I did not say anything to the conductor or brakeman about wanting to go into the other car, and made no complaint. I did not get off the train at any point." According to his own statement, he voluntarily submitted to the discomforts of the smoking car without objection or complaint, and cannot, therefore, claim damages therefor. He was not justified in accepting the direction given him by the train porter at the station to the car which he should enter as a command to remain therein throughout his journey. The train was in charge of the conductor, and when appellant found that the car to which he had been assigned by the porter was uncomfortable, and not such accommodation as he was entitled to on his ticket, he should have appealed to the conductor for more comfortable quarters. Failing to do so, he is deemed to have voluntarily accepted the place assigned him with its discomforts. He had reached the age of discretion, and cannot be allowed to claim damages on account of a situation caused by a mistake of the porter, which he accepted, and gave the railroad company, through its proper official in charge of the train, no opportunity to correct.

The judgment is affirmed.

RICHARDSON v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina, April 18, 1905.)

[51 S. E. Rep. 261.]

Appeal—Harmless Error.—That a charge is not revelant to any issue in the case is not ground for reversal, where no prejudice is shown.

Carriers—Ejection of Passenger—Punitive Damages.*—Where a

*As to the right to recover punitive or exemplary damages for injuries to passengers, see foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48; foot-notes appended to *Northern Cent. Ry. Co. v. Newman* (Md.), 10 R. R. R. 525, 33 Am. & Eng. R. Cas., N. S., 525.

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passenger buys a ticket to a station which the agent tells him is on the main line, and, on changing cars, is shown by a person in uniform a train for his destination, but after it starts is told by the conductor that it is a through train and will not stop, and is put off with only such force as was necessary, on refusal to pay the additional fare to the next stopping point, and is again received on payment of his fare, and carried to the station beyond, he is entitled to punitive damages.

Appeal from Common Pleas Circuit Court of Richland County ; Watts, Judge.

Action by E. L. Richardson against the Atlantic Coast Line Railroad. Judgment for plaintiff, and defendant appeals. Affirmed.

George Johnstone and Frank G. Tompkins, for respondent.

JONES, J. The plaintiff brought this action against defendant company for an alleged unlawful and willful ejection from its passenger train at Pee Dee, S. C., on the 26th day of September, 1903, which resulted in a verdict and judgment in favor of plaintiff for \$875. The defendant appeals on two grounds—one complaining of the instruction to the jury, and the other of the refusal to grant a new trial.

Appellant complains of the following charge to the jury: "I charge you further, as a matter of law, if you go down to one of these railroad offices and buy a ticket and pay full fare for it, and there is no time limit, the time you are to use that ticket is not limited. You may buy a straight ticket—pay full fare—with no time limit to it. You have the right to put that ticket in your pocket, and use it whenever you see proper. But if you buy the ticket and board the train, you must make continuous passage. You cannot stop over on the ticket between two different points unless the ticket gives you that privilege. If you buy a straight ticket to a place, you need not use it immediately, but, if you do commence to use it, then you must go on through; otherwise, if you drop off, you will have to pay again." It was alleged that this charge was erroneous: "(a) That, in so far as it refers to making a continuous trip when starting, it was not relevant to any issue in the case, nor premised any fact in the case, but it was misleading and calculated to prejudice the jury. (b) That, where there is necessary changing of cars and conductors, the same ticket being used, the law does not require a continuous journey unless it is so stipulated on the ticket." This exception cannot be sustained. If, as stated under specification "a," the charge was not relevant to any issue in the case, nor premised on any fact in the case, it does not constitute reversible error, unless appellant could show wherein it was prejudiced thereby, and no such showing has been made. With reference to specification "b," it is sufficient in addition to say that appellant made no request that the court modify its general statement of the law in the particular mentioned.

With reference to the refusal of the motion for a new trial,

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it is excepted (1) that there was no evidence of actual damages beyond 50 cents; (2) that there was no evidence of a willful tort, such as to justify punitive damages for any sum. Punitive damages may be awarded for any intentional ejection of a person from a passenger train, no matter how slight the force used, if such ejection is unlawful. Such an act is not characterized by inadvertence or negligence, but is a willful invasion of a personal right.

The evidence on behalf of plaintiff was to the effect that he was a lawyer residing at Greenwood, S. C., and had business to transact at Latta, S. C.; that, having reached Columbia, S. C., on his way, he there, on September 28, 1903, purchased a straight ticket from Columbia, S. C., to Latta, S. C., paying full fare therefor; that the ticket had no conditions or limitations on it; that when the ticket was purchased the ticket agent at Columbia, S. C., informed him that Latta was on the main line, and that he would reach Latta that afternoon or evening; that plaintiff boarded defendant's train and went to Sumter, and, after changing cars there under instructions, went to Florence. At Florence plaintiff took a train which he was informed by one wearing a uniform and carrying a lantern, whom he took to be a servant of the defendant company, was the train for Latta, but which was in fact a through limited train that did not stop at Latta, but defendant was not aware of this, and boarded the train, supposing it would stop at Latta. This train was the next and only train due to pass Latta that night. According to the company's regulation, this train did not stop to take on or let off passengers after leaving Florence until reaching Dillon, the next stop. Latta is an intermediate station, 7 miles from Dillon and 11 miles from Pee Dee, another intermediate point 13 miles from Florence, where the fast train slacks up for registering slips. When the conductor, after leaving Florence, came along for tickets or fare, the plaintiff presented his ticket for Latta, and was then informed that the train would not stop at Latta, but that plaintiff would be carried to Dillon upon payment of 19 cents in addition to his ticket to Latta; otherwise he would have to be ejected. Plaintiff refused to make further payment, and refused voluntarily to leave the train, and demanded to be put off at Latta. Thereupon he was ejected from the train at Pee Dee, with only such slight force as plaintiff's slight resistance rendered sufficient. After ejection from the train, plaintiff immediately tendered fare to Dillon, and was again received on board, and carried to Dillon. The next morning, plaintiff took a local train to Latta in time to fill his business appointment. The actual damages by way of additional expenses did not exceed 50 cents. This afforded some evidence to be submitted to the jury on the question whether plaintiff's rights were willfully violated. The real issue in the case was whether plaintiff's ejection was unlawful, for, if unlawful, there was sufficient evidence of willfulness to warrant punitive damages. This issue depended upon the contested question of fact whether the defendant's agent at Columbia, S. C.,

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sold plaintiff a ticket from Columbia, S. C., under representation that plaintiff would be transported to Latta that night, and whether another agent of defendant at Florence informed plaintiff that the train he took was the train for Latta. This was submitted to the jury under instructions to which no exception has been taken. If plaintiff boarded defendant's train at Florence under these circumstances—and we must assume from the verdict that he did—and it being undisputed that there was no other train to carry plaintiff to Latta that day, we are of the opinion that he was rightfully on board that train as a passenger for Latta, and his ejection before reaching his destination was unlawful, as the rule of the company not to stop that particular train at Latta, whether reasonable or not, must be held subordinate to the right of the passenger on board under a contract made under circumstances implying that it would stop there. It was therefore no error of law to refuse a new trial on the ground that there was no evidence that the ejection was willful or wanton, so as to justify punitive damages.

The exceptions are overruled, and the judgment of the Circuit Court is affirmed.

POPE, C. J., and GARY, A. J., concur.

 FT. WORTH & D. C. RY. CO. *et al.* v. STATE.

(Supreme Court of Texas, May 18, 1905.)

[87 S. W. Rep. 336.]

Anti Trust Law—Application—Contract between Railroad and Sleeping Car Company—Furnishing Sleeping Cars.*—Laws 1903, p. 119, c. 94 (Anti-Trust Law March 31, 1903, 28th Leg.) § 1, forbids combinations of capital, skill, or acts by two or more corporations

*For the authorities in this series on the subject of the legality of combinations between carriers, see *Yazoo & M. V. R. Co. v. Searles* (Miss.), 14 R. R. R. 465, 37 Am. & Eng. R. Cas., N. S., 465 (car service association); *Northern Securities Company v. United States* (U. S.), 11 R. R. R. 56, 34 Am. & Eng. R. Cas., N. S., 56; *Dady v. Georgia & A. Ry.* (Ga.), 1 R. R. R. 594, 24 Am. & Eng. R. Cas., N. S., 594 (right of railroads to consolidate as affected by fact that they both cross shallow rivers upon which are freight and passenger steamboats); *Yazoo & M. V. R. Co. v. Southern Ry. Co.* in Miss. (Miss.), 12 R. R. R. 234, 35 Am. & Eng. R. Cas., N. S., 234 (Miss. Acts 1902, p. 141, c. 89, authorizing a competing company to purchase a portion of the Southern Ry. Co's line, is unconstitutional); *United States v. Trans-Missouri Freight Association* (U. S.), 7 Am. & Eng. R. Cas., N. S., 388; *Louisville & Nashville R. Co. v. Kentucky* (U. S.), 3 Am. & Eng. R. Cas., N. S., 525; *East St. Louis Connecting Ry. Co. v. Jarvis* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 459 (consolidation of parallel and competing lines); *Pearsall v. Great Northern R. Co.* (U. S.), 3 Am. & Eng. R. Cas., N. S., 503 (consolidation of competing lines); *State v. Central of Georgia Ry. Co.* (Ga.), 16 Am. & Eng. R. Cas., N. S., 845; note, 11 Am. & Eng. R. Cas., N. S., 796 (validity of contracts between railroads to prevent competition).

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for the following, among other, purposes: First, to fix or maintain any standard or figure whereby the cost of transportation shall be in any manner affected or established; second, to make any contract to keep the cost of transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the cost of transportation, or by which they shall agree to pool, combine, or unite any interest they may have in connection with any charge for transportation. Held, that a contract whereby a sleeping car company was to furnish sleeping cars for a railroad company, and in which the only reference to any charges to be made was the stipulation that the sleeping car company might charge passengers on its cars on the line of the railroad company such fares as were customary on competing lines of railroads, where equal sleeping accommodations were furnished, did not violate the statute through interference with transportation of passengers.

~~Same—Same—Same—Same.~~—Nor did the contract in any way affect or tend to affect transportation or charges therefor in that its provisions that the railroad company should pay for the sleeping cars used a mileage of 2 cents per mile for every mile run on its road, unless the average revenue from the sales of seats and berths was between \$5,000 and \$6,000, when one cent per mile should be paid, but, if it equaled or exceeded \$6,000, no mileage was to be paid, had a tendency to increase the rates charged on the sleeping cars, in order to reach the maximum revenue of each car; for, while the railroad company would be benefited by the increased revenue of the other company through a reduction or release from mileage, it had no power over the sleeping car charges.

~~Same—Same—Same—Same.~~—The further provision of the statute prohibiting such combinations from creating or carrying out restrictions in the free pursuit of any business authorized or permitted by the laws of the state was not violated by the stipulation in the contract granting the sleeping car company the exclusive right for 15 years of furnishing sleeping cars for use on all lines of road owned or controlled by the railroad, or thereafter acquired or operated by it, since neither the former company nor any other corporation or person had a right irrespective of contract to attach sleeping cars to the railroad's passenger trains, and therefore no business right existed to be restricted.

~~Same—Same—Same—Same.~~—Section 2 of the statute (Laws 1903, p. 119, c. 94) defines a monopoly as "a combination or consolidation of two or more corporations, when effected in either of the two following methods: (1) When the direction of the affairs of two or more corporations is in any manner brought under the same control for the purpose of producing * * * a trust, as defined in the first section of this act. (2) Where any corporation acquires the franchises or other rights or the physical properties * * * of any other corporation * * * for the purpose of preventing or lessening * * * competition," etc. Held, that the contract did not constitute a monopoly within the terms of said section 2, as the agreement by the railroad to haul the cars of the sleeping car company did not transfer to the latter any of the former's franchise authorizing it to operate trains over its road.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by the state of Texas against the Ft. Worth & Denver City Railway Company and another. Certified questions from the Court of Civil Appeals of the Third Supreme Judicial District.

Ft. Worth, etc., Ry. Co. v. State

Stanley, Spoons & Thompson, Andrews, Ball & Streetman, and *J. D. Guinn*, for appellants.

C. K. Bell, Jno. W. Brady, Allen & Hart, and *D. A. McFall*, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals of the Third Supreme Judicial District. The statement and questions are as follows:

"The Court of Civil Appeals of the Third Supreme Judicial District certifies that the above styled and numbered cause is now pending and undecided in this court, wherein the state of Texas was plaintiff in the court below in a suit against the defendants, the Ft. Worth & Denver City Railway Company and the Pullman Palace Car Company, to recover penalties for a violation of the anti-trust laws of 1899 (Laws 1899, p. 246, c. 146) and the anti-trust statute of 1903 (Laws 1903, p. 119, c. 94). The case was tried before the court without a jury, and the trial court concluded that there had been no violation of the anti-trust law of 1899, but that there was a violation of the anti-trust statute of 1903, and assessed a penalty against each of the defendant corporations in the sum of \$18,550.

"The findings of fact of the trial court, which we adopt and approve, are as follows:

"First. The Ft. Worth & Denver City Railway Company is a railway corporation chartered by a special act of the Legislature approved May 26, 1873 (Laws 1873, p. 585, c. 208), which said act is hereby made a part of this statement of facts, and acting under said charter the said company's railway line was constructed, and since its construction has been in operation, and during said time it has operated a line of railway, and still operates a line of railway, from Ft. Worth, in Tarrant county, Texas, to Texline, in Dallam county, Texas. The Pullman Company is a corporation organized, chartered, and doing business under and by authority of the laws of the state of Illinois.

"Second. That on the 1st day of February, 1899, or the 13th day of March, 1899, the Ft. Worth & Denver City Railway Company and the Pullman Palace Car Company made and entered into a contract, such contract being signed in the city of Chicago, Ill., by the vice president and secretary of said Pullman's Palace Car Company, and signed in the city of Denver, Colorado, by the president of the Ft. Worth & Denver City Railway Company, and was attested and the seal of the Ft. Worth & Denver City Railway Company affixed thereto by the secretary of said last-named company at Fort Worth, Texas, and such contract is as follows:

"This agreement, made the 1st day of February, A. D. 1899, between Pullman's Palace Car Company, hereinafter called Pullman Company, party of the one part, and the Fort Worth & Denver City Railway Company, hereinafter called the Railway Company, party of the other part, witnesseth:

"Whereas, on the 1st day of March, A. D. 1888, a contract

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was made between the Pullman Company, and the Railway Company, in pursuance of which the sleeping cars of the Pullman Company were to be operated over the lines of the railway company for a period of fifteen years from the 1st day of March, A. D. 1888; and

“Whereas, the railway company desires to terminate said contract for the purpose of entering into a new contract, and the Pullman Company is willing to enter into such new contract:

“Now, therefore, in consideration of the premises and of the agreements hereinafter contained, the said contract is terminated between the parties hereto, and they agree as follows:

“Article 1.

“Section 1. The Pullman Company shall furnish sleeping cars, properly equipped and acceptable to the Railway Company, sufficient in the judgment of the general manager or superintendent of the Railway Company, to meet the requirements of travel over the lines of railroads now owned or controlled by the railway company, and over all additional railroads which it shall hereafter own or control.

“Section 2. The Pullman Company remaining the owner of all the sleeping cars furnished hereunder, and maintaining the same except as herein provided, shall have the right to collect such fares from railroad passengers occupying such cars for the use of seats and berths therein, as are customary on competing lines of railroads where equal sleeping car accommodations are furnished; no more room in said sleeping cars shall be furnished to any person or persons than is usually furnished to passengers by railroad companies which use their own sleeping cars, unless by the assent of the proper officer of the Railway Company.

“Section 3. The Pullman Company shall furnish with each of such sleeping cars one or more employees, as may be necessary, whose duties shall be to collect fares from railroad passengers, occupying said cars, for the use of seats or berths therein, and generally to wait upon and provide for the comfort of passengers therein; such employees at all times shall be subject to the rules of the railway company governing its own employees.

“Section 4. The Pullman Company, except as hereinafter provided, shall keep all of such sleeping cars in good order and repair and shall renew and improve the same so far as may be necessary to keep them up to the average standard of approved sleeping cars furnished by the Pullman Company for general use on competing lines.

“Section 5. The Pullman Company shall save harmless the Railway Company from damages, costs and expenses, growing out of, or incident to, any claim that may be made to the effect that any of such sleeping cars or any part thereof, or any improvements therein or thereon, is an infringement upon Letters Patent of the United States covering like cars, or like parts thereof, or like improvements thereon or therein; provided the Railway Company shall first give the Pullman Company written

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notice of any such claim, when made, in order that it may resist the same should it desire to do so.

“ ‘Section 6. The Pullman Company will place its tickets for seats and berths on sale in such of the railroad ticket offices as either party may consider necessary for the convenience and accommodation of passengers.

“ ‘Section 7. The Pullman Company shall furnish free passes to the general and division officers of the railway company, for use in said sleeping cars, over the lines of railroad now owned or controlled by the railway company, and over any additional railroads which it may hereafter own or control.

“ ‘Article 2.

“ ‘Section 1. The Railway Company shall haul all said sleeping cars furnished by the Pullman Company hereunder that may at any time be necessary in operating the lines of railroad now owned or controlled by the Railway Company, and any additional railroads which it shall hereafter own or control; and shall use such cars as a part of all passenger trains controlled, in whole or in part by it, where sleeping cars are required, in such manner as shall best accommodate passenger travel.

“ ‘The Railway Company shall also, in consideration of the use of said sleeping cars for the transportation of its passengers, bear the costs of maintaining the running gear and bodies of such cars, and other parts thereof as are essential to ordinary first class passenger cars, and are not incidental to a sleeping car, which cost is understood and agreed to amount to an average of two cents per mile run, and shall, except as hereinafter provided, pay to the Pullman Company, in satisfaction of such obligation, two cents per car per mile for every mile run by said sleeping cars upon the roads of the railway company, or upon the roads of other railroad companies by direction of the officers of the Railway Company.

“ ‘The Railway Company shall pay one cent per car per mile for every mile run by tourist or second class sleeping cars furnished under this contract.

“ ‘Section 2. The Railway Company shall haul, without charge to the Pullman Company said sleeping cars to and from repair shops, and to and from other points on the lines of railroads at any time owned or controlled by it, as may be necessary in order that such sleeping cars may be put in good order and repair or be renewed or improved as required hereunder. No mileage shall be paid on the cars so hauled.

“ ‘Section 3. The Railway Company shall furnish and apply to said sleeping cars all necessary lubricating material, ice and water, fuel for heating, and oil, fluids or other proper material for lighting; and shall wash and clean said cars; and shall replace bell cords and couplings and air-brake hose and couplings, as often as necessary.

“ ‘Section 4. The Railway Company shall pay to the Pullman Company the cost of repairing and making good all damages to

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any of its sleeping cars resulting from accident or casualty on the lines of its roads, or on any other roads upon which any of said cars may be run by direction of the Railway Company, except damages resulting from accident or casualty arising from defective heating or lighting apparatus, or from the actual negligence of the employees of the Pullman Company in the line of their employment.

“Section 5. The Railway Company shall promptly make all such repairs as may be necessary to put any of said sleeping cars in good order, whenever requested by the Pullman Company so to do; and shall, without request, make such repairs as may be required at any time to insure the safety of said cars, and when the Pullman Company is, by the terms hereof, under obligation to make such repairs, shall, at the end of each month, render to the Pullman Company bills therefor, charging the actual cost of material and labor expended on such repairs, with an addition of ten per cent. to cover general expenses.

“Section 6. The Railway Company shall furnish, free of charge at convenient points, rooms and necessary facilities for airing and storing bedding, linen, supplies and other movables belonging to or designed for the use of said sleeping cars.

“Section 7. The Railway Company shall require its ticket agents, at such offices as may be designated by either party, to sell tickets for seats and berths in said sleeping cars, without charge to the Pullman Company; the proceeds of such sales to be at the risk of the Pullman Company.

“Section 8. The Railway Company shall furnish free passes to the general and division officers of the Pullman Company, over the lines of railroads now owned or controlled by the Railway Company, and over any additional railroads, which it shall hereafter own or control.

“Article 3.

“Section 1. All settlements and payments for mileage and repairs shall be made monthly between the parties hereto; subject, however, to adjustment at the close of each contract year on the following basis:

“Whenever the revenue from the sales of seats and berths on any line shall be at a rate less than five thousand dollars per car per annum, on all the cars employed upon such lines, the railway company shall pay two cents per car per mile run by the cars on such line.

“Whenever such revenue upon any line shall be at a rate of five thousand dollars or more, but less than six thousand dollars per car per annum, on all the cars employed upon such line, the Railway Company shall pay one cent per car per mile run by the cars on such line.

“Whenever such revenue upon any lines shall be at a rate six thousand dollars or more per car per annum, on all the cars employed on such line, the Railway Company shall not pay any mileage on the cars on such line.

“If any line shall be operated for a fraction of a year, then

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the mileage payable by the Railway Company on such cars shall be adjusted at the rate per mile run which would be payable thereon continued during the entire year at the same rate during the entire year as during the period of such employment.

“ ‘Whenever such revenue equals or exceeds an average of six thousand dollars per car per annum from the whole number of cars furnished, the Railway Company shall not pay any mileage on such cars.

“ ‘In determining the number of cars furnished, and the rate of revenue per car per annum, upon any line or upon all lines, twenty per centum shall be added to actual days’ service of such cars in order to cover shoppage and idle time of cars.

“ ‘Section 2. The Railway Company shall have the right to co-operate with other railroad companies in forming through and continuous lines of sleeping car service; and if it should become necessary for the railway company so to co-operate with other railroad companies using sleeping cars not owned by the Pullman Company, the Pullman Company shall have the right to furnish its pro rata of sleeping cars, for service on such through or continuous lines, based upon the mileage of the Railway Company in said lines; and in all cars operated on such through or continuous lines the Pullman Company shall be entitled to receive all local fares for the use of seats and berths therein upon the roads of the Railway Company, and its mileage proportion of through and intermediate fares.

“ ‘Section 3. If any of the Pullman Company’s employees furnished with any of the sleeping cars operated under this agreement, should be injured or killed in consequence of a railroad accident, or casualty, when serving in the line of his duties, the Railway Company shall save harmless the Pullman Company from damages, costs and expenses growing out of or incident to such injury or death, to the extent that the railway company would be liable if such employee were in fact an employee of the Railway Company when so injured or killed, and the Pullman Company shall save harmless the Railway Company from such damages, costs and expenses to any greater extent; each party to have immediate notice from the other of any claim or suit for such injury or death, and the right to resist or defend such claim or suit.

“ ‘Section 4. If either of the parties hereto shall fail to clean or repair, according to its obligation under this agreement, any of said sleeping cars, and shall, after written notice from the other party of the neglect complained of, further neglect or refuse to so clean or repair said sleeping cars within a reasonable time, such other party shall have the right to clean said cars and to make or cause to be made all necessary repairs and renewals thereof, and shall, at the next monthly settlement between the parties, be repaid the cost of such portion of the cleaning or repairs as the party in fault is liable for by the terms of this contract.

“ ‘Section 5. If either of the parties hereto shall fail to keep or perform any of its agreements hereunder, and shall continue

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in default for sixty days after written notice of such failure from the other party, then such other party shall have the right to declare this agreement terminated at such time as shall be specified by written notice of its intention to terminate the same.

“Section 6. This agreement shall be construed liberally, so as to secure to each party all the rights, privileges and benefits herein provided or manifestly intended, and if any difference between the parties shall arise which cannot be amicably adjusted by and between the parties, it may be submitted to referees, one to be appointed by the Railway Company, and one by the Pullman Company, the two, in case of disagreement, to appoint a third; the decision of two of them to be final.

“Section 7. The Pullman Company shall have the exclusive right during the continuance of this agreement, to furnish all sleeping cars for use on all the lines of railroads now owned or in any way controlled by the Railway Company, including branches and bridges, and on all the additional railroads which it shall hereafter own or in any way control; and also on all passenger trains on which it may, by virtue of contracts or running arrangements with person, companies or corporations owning or controlling other lines of railroad, have the right to use such cars; and the Railway Company, except as provided in Section 2 of this article, shall not contract with any other person, company or corporation to run any sleeping cars on or over any of the lines of railroads aforesaid during the said period.

“Section 8. This agreement shall take effect February 1st, A. D. 1899, and shall remain in force for the full term of fifteen years from the date hereof, subject to the right of either party, at its option, to terminate the same on the first day of February, A. D. 1909, by giving notice in writing to the other party of its intention to do so at least six months before the date last named; unless the same shall be sooner terminated by virtue of the provisions of section 5 or article 3 of this agreement, or by the mutual agreement of the parties hereto.

“In witness whereof, the parties hereto have signed, sealed and delivered these presents, the day and year first herein written.

“Attest:

“Pullman's Palace Car Company,

“By T. H. Wickes, Vice President.

“A. M. Weimsheiner, Secretary.

“Attest:

“The Fort Worth & Denver City Railway Company,

“By Frank Trumbull, President.

“Geo. Strong, Secretary.

“Signed at Denver, Colo., March 13, 1899.”

“That since the execution of said contract continuously up to the time of the trial of this case sleeping cars have been operated by the defendants under said contract.”

We omit the facts certified which are irrelevant to the questions under our view of the law.

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The Court of Civil Appeals certified these questions:

“(1) Is the contract in question, as set out in the findings of fact, executed between the Railway Company and the Pullman Company, in view of the facts as stated, in violation of any provision of the first section of the anti-trust statute of March 31, 1903, page 119, c. 94, of the Session Laws of the Twenty-Eighth Legislature?

“(2) Does such contract, in view of the facts, constitute a monopoly within the meaning of section 2 of said anti-trust statute, or is its tendency to create a monopoly within the meaning of that section?”

The acts forbidden by the law of 1903 are so numerous that we will not undertake an examination of each one separately in this opinion. We have carefully examined the entire act, and each specification in reference to its application to the facts of this case, and we are of the opinion that the following are the only provisions of the act which have a semblance of applicability to this contract: First. To fix or maintain any standard or figure whereby the cost of transportation shall be in any manner affected or established. Second. To make any contract by which they shall agree to keep the cost of transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the cost of transportation, or by which they shall agree to pool, combine, or unite any interest they may have in connection with any charge for transportation. Third. To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.

Without so deciding, we will, for the purposes of this opinion, assume that the facts of the case show a combination between the corporations named, and that the word “transportation,” as it occurs in the act, embraces carriage of both passengers and freight. The first inquiry that we shall address ourselves to is, do the facts and the contract set out in the statement upon which the questions are submitted show that the law has been violated by the corporations through any interference with transportation of passengers? The only reference in the contract to any charges to be made by either company is the stipulation that the Pullman Company should not charge passengers in its cars on the line of the Ft. Worth & Denver City Railroad Company more than it charged on the lines of competing railroads. The contract did not require that the charges should be maintained as they were then fixed, nor did it fix any standard of charges by which either company should be governed. No pooling or combining of rates between the said companies was provided for, but each was at liberty to prescribe its own charges, and to change them at its pleasure. Neither corporation was entitled to receive any part of the charges made by the other. In fact, there was no semblance of a pooling or combination of rates, nor is there anything in the contract by which it would be possible to hold that the making, maintaining, or charging of rates by

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either company, or by any other company, corporation, or person, would be in the least affected, or could possibly be affected.

Counsel for the state contend that the provisions of the contract by which the mileage to be paid by the railroad company for the use of the sleeping cars was to be regulated by the average amount received from each sleeping car, so that, in case the collection on each car should exceed \$6,000 a year, no mileage should be paid by the railroad company, had a tendency to increase the rates charged on the sleeping cars in order to reach the maximum revenue of each car. Certainly this could not have been an inducement to the Pullman Company to increase its charges, because by increasing its rates and the revenue from each car it would lose the mileage to be paid by the railroad company; for, although its increased revenue might be greater than the mileage, yet the loss of the mileage could not have been an inducement for the increase of the rates. The railroad company would be benefited by the increased revenue of the other company by a reduction or release from mileage, but it had no power over the charges of the Pullman Company. It is manifest that the contract did not in any way affect, or tend to affect, transportation, or charges therefor.

Did the contract "create or carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this state"? The anti-trust act does not create a new business for any person, nor does it give a new right in the property of others, but the object of the law was to prevent interference with business authorized and carried on in accordance with the laws of the state. It is therefore pertinent to inquire, what business interest was in any way affected by this contract? The two companies unquestionably had the right to contract that the one should furnish the sleeping cars and maintain them, thereby furnishing accommodations to the passengers of the other, and to collect fares therefor. So far the contract is in conformity to law. This action rests alone upon the alleged illegality of the provision of the contract which grants to the Pullman Company the exclusive right to furnish sleeping cars for use on all lines of road owned or controlled by the Ft. Worth & Denver City Company, and all roads which it might thereafter acquire or operate. Waiving the fact that at the time the law of 1903 was enacted there was no other person or company engaged in the like business in Texas, we come to the question, did the railroad company have the lawful right to make a contract with the Pullman Company whereby it excluded all other companies for 15 years from furnishing to the railroad company sleeping cars for use on all of its lines? That question suggests this: Did all sleeping car companies have a right to demand of the railroad company to haul their coaches on its railroad? If yea, the contract restricted the free pursuit of a lawful business, and constitutes a trust under the act of 1903; otherwise the law has not been violated by the agreement. The effect of this contract was that the railroad company rented from the sleeping car com-

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pany its coaches, agreeing to haul them over its lines of road, the sleeping car company furnishing sleeping accommodations and other conveniences to such passengers of the railroad as should desire them. The demand of the traveling public for sleeping cars and like conveniences imposes upon railroads an obligation as potent as a rule of law. The demand must be complied with, which the carrier may do either by furnishing its own coaches or by contracting with another corporation, as in this case. In order to justify a sleeping car company in furnishing such accommodations, the railroad may give the exclusive right, because it is necessary to permanent and reliable service which is in the interest of the public. This contract in no way interfered with the right of any other sleeping car company, if any existed, to build or furnish its cars to other railroads. Neither the Pullman nor any other corporation or person had a right to have sleeping cars attached to the passenger trains of the Ft. Worth & Denver City Railroad Company. Therefore to exclude them did not restrict "the free pursuit of any business authorized or permitted by law," because such business was not authorized to be pursued on a railroad without the consent of the owner; and, since no such business right existed, it could not be restricted. *Lewis v. Railroad Co.*, 81 S. W. 111, 10 Tex. Ct. Rep. 423; *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; *Express Cases*, 117 U. S. 26, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Chicago, St. L. & N. O. Ry. Co. v. Pullman So. Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *Fluker v. Georgia Ry. & B. Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Barney v. O. B. & H. Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115.

Lewis v. Railroad Company, above cited, was decided by the Court of Civil Appeals of the Second District in this state, and an application for writ of error was refused by this court. In that case the facts showed that the railroad company had granted an exclusive privilege to one person to go upon its trains and solicit of passengers baggage to be hauled from the train to different parts of the city. Lewis was engaged in the same business at Mineral Wells, and insisted that he had the right to have a solicitor upon the trains of that railroad with like privilege. The railroad company brought an action to enjoin him from so doing. The injunction was granted, and at the trial was perpetuated by the trial court, which judgment was affirmed by the Court of Civil Appeals. It was contended that the contracts between the railroad company and the person authorized to solicit on its trains was a restriction upon a business authorized and permitted by the laws of this state. In a well-considered opinion by Judge Speer, the Court of Civil Appeals held that, while Lewis had the right to pursue that business, he would not prosecute it on the train of the railroad company without its consent.

In *Kates v. Baggage Company*, before cited, the Supreme Court of Georgia, in an elaborate and able opinion, held the rail-

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road company had the right to make a contract with one person whereby it excluded all others from "the business" of soliciting baggage on its trains.

Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, consisted of three separate suits by express companies against three different railroads to compel the latter to furnish the same facilities for carrying express matter on the respective railroads that the express companies had enjoyed under contracts which each railroad company had terminated. The issue is clearly stated in this language: "The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." Practically the same question is presented in this case. Upon a thorough examination of this issue, the Supreme Court of the United States held that express companies had no such rights, and that a railroad company had the right to make contracts whereby it would limit the number of persons or companies who might pursue such a business on its trains.

In *Railroad Company v. Pullman Car Company*, before cited, a contract almost identical in terms with this was the basis of the action. Two cars of the Pullman Company having been destroyed, it brought suit upon the contract to recover for their value, to which the railroad company pleaded that the contract by which it gave the exclusive right to the Pullman Company to furnish sleeping cars for use upon the railroad was void, because it was contrary to public policy, and was in restraint of trade. In answer to the contention that the contract was in restraint of trade, the Supreme Court of the United States said: "The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for fifteen years to furnish drawing room and sleeping cars for the defendant's use, and that the defendant should not, during that period, contract for cars of that kind with any other party, rightfully construed, is not unreasonable, and, properly performed, will promote the convenience of the public, in that it enables the defendant to have on its lines at all times, and as the requirements of travel demand, drawing room and sleeping cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot, for the reasons stated, be sustained." That case is analogous to this, and supports our conclusion.

Section 2 of the anti-trust law of 1903 (Laws 1903, p. 120, c. 94) defines a monopoly as follows: "Sec. 2. That a monopoly

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is a combination or consolidation of two or more corporations when effected in either of the following methods: (1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act. (2) Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise." The direction of the "affairs" of neither of the corporations to this contract is brought under the control of the other, nor are the affairs of both corporations brought under the management of another corporation or person. Neither of these corporations acquired the shares or certificates of stock or bonds of the other by this contract, nor does the contract transfer to either company any "franchise, or other rights, or the physical properties" of the other company. The agreement by the railroad company to haul the cars of the Pullman Company did not transfer to the latter any of the franchise of the former by which it was authorized to operate trains over the road. On the contrary, the railroad company, in the performance of the contract, exercised its franchise. The sleeping cars were the only physical "properties" which were involved or in any way dealt with in this transaction, and they were not acquired by the railroad company, but remained the property of the Pullman Company. The control which the railroad company acquired over the sleeping cars did not tend to effect or lessen competition either in transportation by the railroad company or in the business of the sleeping car company. We conclude, therefore, that the contract between the two corporations "did not constitute a monopoly within the meaning of section 2 of the anti-trust statute."

We answer both questions propounded in the negative.

FOSS v. PORTSMOUTH, D. & Y. RY. CO.

(Supreme Court of New Hampshire, Strafford, April 4, 1905.)

[60 Atl. Rep. 747.]

Medical Testimony—Remarks of Court—Harmless Error.—On cross-examination of one of plaintiff's medical witnesses, defendant's counsel asked him about the relative authority of certain medical writers on nervous diseases, and inquired of him if he would produce in court the work of a certain specialist. Thereupon the court remarked: "I guess we won't go into a comparison of books. If they don't give us any more information than some law books do, we shan't get much from them." Held, that as the remark was conditional in form, and, as it was not the statement of a fact, it could

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have conveyed no information to the jury as to the reliability of medical theories advanced by the witness, and was therefore immaterial and harmless.

Injury to Passenger—Evidence—Failure of Other Passengers to Complain.—In an action against a carrier for injuries in a collision, evidence that other passengers had not complained of having been injured in the accident, and that none had made claim against defendant on account of the injuries, was collateral to the main issue, and properly excluded.

Exceptions from Superior Court; Stone, Judge.

Action by Mercy E. Foss against the Portsmouth, Dover & York Railway Company. Verdict in favor of plaintiff, and defendants brings exceptions. Exceptions overruled.

August 28, 1903, there was a collision between two of the defendants' cars, upon one of which the plaintiff was riding, in consequence of which she claimed to have sustained physical injuries. Whether she was injured by the collision was the issue tried. Upon the cross-examination of one of the plaintiff's witnesses (a physician), the defendants' counsel asked him about the relative authority of certain medical writers on nervous diseases, and inquired of him if he would produce in court the work of a certain specialist. Thereupon the court remarked: "I guess we won't go into a comparison of books. If they don't give us any more information than some law books do, we shan't get much from them." To this remark the defendants excepted. The defendants, having introduced evidence that the shock from the collision was slight, and that no other passenger was injured, offered to show that no passenger on either car had complained to them of having been injured, and that no other claim for damages for such injury had been brought against them. The evidence was excluded, and the defendants excepted.

William F. Nason, for plaintiff.

John Kivel, *Samuel W. Emery*, and *George T. Hughes*, for defendants.

WALKER, J. The defendants claim that the remark to the court was prejudicial and rendered the trial unfair. But as it was conditional in form, and as it was not even the statement of a fact, it could have conveyed no information to the jury as to the reliability of medical theories advanced by the medical witnesses. The court, in effect, said that he did not know whether much information could be derived from medical books—a statement which was plainly immaterial and harmless. *Dow v. Electric Co.*, 68 N. H. 59, 31 Atl. 22.

Whether other passengers had complained to the defendants of having been injured in the accident, or whether any of them had made claims for damages against the defendants on account of such injuries, were matters collateral to the main issue, and the evidence bearing thereon may have been properly excluded on the ground of remoteness. *Kendall v. Flanders*, 72 N. H. 11, 54 Atl. 285.

Exceptions overruled. All concurred.

ALABAMA & V. RY. CO. *v.* RAILROAD COMMISSION OF MISSISSIPPI

(Supreme Court of Mississippi, May 8, 1905.)

[30 So. Rep. 356.]

Carriers—Rebiling Rate—Definitions.—A true rebiling rate is one in which goods received in unbroken car load lots over one line of railway can be rebilled over the same or another line, completing one continuous trip, simply changing the consignee, and altering the destination of the identical shipment, without unloading.

Same—Same—Same—Discrimination.—A so-called "rebiling rate" adopted by a railroad, which is not applied to consignments arriving over all connecting lines, but is only available to those receiving freight over associate lines, and under which freight reconsigned over the rebiling road does not complete one continuous trip without rehandling, and is not necessarily the identical shipment originally consigned, there being a custom of granting dealers handling freight over the associate line the privilege within 90 days from the date of their "expense bills," or receipts showing the amount of freight received over such line, of shipping an equal amount of freight over the rebiling line at the rate adopted, is not a true rebiling rate.

Same—Same—Discrimination.*—Evidence that the effect of such a rate adopted by complainant railroad was to enable a dealer in Vicksburg, the terminus of its road reached by associate line, to ship a barge load of grain received there, over complainant's road, at the rate of 3½ cents, under the guise of rebiling, while a barge load of grain received there by a dealer in Meridian, the other terminus of complainant's road, could only be shipped over the same upon payment of the local rate of 10 cents per 100 pounds, showed an unjust discrimination in favor of those receiving freight over the associate line.

Same—Same—Voluntary Act.—In the absence of record proof showing any official action by the Railroad Commission, the putting in force of the rebiling rate will be held a voluntary act of complainant railroad.

Same—Same—Same.—The condition, prerequisite to the enjoyment of the rebiling rate, that a shipper at either terminus should first receive freight over the associate road, was a discrimination against the Meridian dealer, who would have no means of disposing of freight consigned to him at Vicksburg over the associate line, and hence could not accumulate the "expense bills" demanded.

Rebiling Rate—Validity.—A "rebiling rate," to receive the sanction of law, must operate uniformly and fairly, and cannot lawfully be restricted to shippers in a certain locality who previously receive freights over a certain other favored associate carrier.

Same—Discrimination—Open or Flat Rate—Railroad Commission—Powers.—Code Miss. 1892, § 4297, authorizes the Railroad Commission to determine all complaints made of any tariff of rates made by any railroad, or fixed or approved by the commission, on the ground that the charges are unjust or discriminatory, and provides that when, by investigation, the commission is satisfied of the justice of the complaint, it shall give notice of any change deemed proper, and require compliance with the order. Held, that the commission had power to abolish a condition precedent to the enjoyment of a so-called "rebiling rate," voluntarily established by a railroad, re-

*As to what is, and is not, discrimination in freight rates, see foot-note appended to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* (Miss.), 12 R. R. R. 471, 35 Am. & Eng. R. Cas., N. S., 471; *Cohn v. St. Louis, etc., Ry. Co.* (Mo.), 11 R. R. R. 47, 34 Am. & Eng. R. Cas., N. S., 47 (long and short haul).

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stricting the rate to the exclusive benefit of those who had received previous and equal shipments of freight over an associated line connecting at one terminus of the road, and to convert the rate into an open or flat rate, so that all dealers handling grain in car load lots could enjoy the rate then in force between the termini.

Freight Rates—Discrimination.—Where a railroad voluntarily establishes as to a certain favored class of shippers a rate so low as to be unremunerative, the rate must nevertheless be granted to all alike.

Appeal from Chancery Court, Hinds County; Robt. B. Mayes, Chancellor.

Bill for injunction by the Alabama & Vicksburg Railway Company against the Railroad Commission of Mississippi. Decree dismissing bill, and complainant appeals. Affirmed.

McWillie & Thompson, for appellant.

McClurg & Gardner, Alexander & Alexander, Wm. Williams, Atty. Gen., and Jno. D. McInnis, Jr., for appellee.

TRULY, J. Many important questions are pressed on our consideration which, in view of our conclusion, we have found it unnecessary to discuss or decide.

The facts which are decisive of this controversy are very few, and a statement of them eliminates from consideration many of the more difficult questions argued by counsel. On December 13, 1902, the Board of Trade of Meridian presented to the Railroad Commission of Mississippi a petition praying that the proportionate rate of $3\frac{1}{2}$ cents then in effect from Vicksburg to Meridian be made an open rate, subject to use of all shippers from Vicksburg. The rate referred to in the petition was a rate on grain and grain products handled in car load lots. This class of freight, under the guise of a "rebilling rate," was transported from Vicksburg to Meridian at the rate of $3\frac{1}{2}$ cents per hundred-weight.

After full investigation, the Railroad Commission on November 16, 1903, passed an order directing the Alabama & Vicksburg Railroad Company "to put in effect over its line of road from Vicksburg, Mississippi, to Meridian, Mississippi, inclusive of both of said cities, from and after Dec. 8th, 1903, a flat rate of three and one half cents per hundred pounds on grain and grain products and no more"; the general terms of this order being limited, however, to grain and grain products handled in car load lots, this being the extent of the power of the petition filed with the commission. Against the enforcement of this order the appellant procured an injunction. On final hearing on bill, answers, exhibits, and proofs, the injunction was dissolved, and a decree rendered dismissing the bill of complaint, and from that decree this appeal is prosecuted.

In reviewing the action of the Railroad Commission in promulgating the order in question, it is necessary, to determine the justice and correctness of their action and their power and authority in the premises, to note the exact condition of affairs

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as they existed at and before the filing of the petition by the Meridian Board of Trade. Vicksburg and Meridian, 140 miles distant one from the other, are the termini of the Alabama & Vicksburg Railway Company; Vicksburg, situated on the Mississippi river, has the advantage of both railroad and river competition; Meridian is a railroad center of considerable importance. In both cities there are many jobbers and wholesale dealers handling grain and grain products in large quantities, and doing an extensive business, both locally, by wagon trade, and over the railroads with adjacent towns. The authorized all-rail interstate rate on grain and grain products in car load lots from the chief market in the West to Vicksburg is 12 cents, to Meridian is 14 cents. On account of the material advantage due to river competition, Vicksburg handles a portion of its business in grain and grain products by barge, and gets the cheaper rate incident to water transportation during some seasons of the year, the minimum river or barge rate being admittedly lower than the all-rail rate. In July, 1902, the Alabama & Vicksburg Railway Company put into effect a so-called "rebilling" rate of $3\frac{1}{2}$ cents per 100 pounds on grain and grain products, effective from Vicksburg to Meridian. A true rebilling rate is one in which goods received in unbroken car load lots over one line of railway can be rebilled over the same or another line, completing one continuous trip of the same commodity, simply changing the consignee, and altering the destination of the identical shipment, without unloading or handling of freight. What is denominated a "rebilling rate" in this record does not, as actually employed, comply with the definition above given in several most important particulars. In the first place, the rate is not applied to consignments arriving over all connecting lines, but is only available to those receiving freight over the Vicksburg, Shreveport & Pacific Railroad. In the second place, the freight re-consigned over the Alabama & Vicksburg Railway Line did not complete one continuous trip, without handling or unloading, and was not necessarily, or even generally, the identical shipment which was originally consigned to the merchant in Vicksburg; the custom being that dealers in Vicksburg handling freight over the Vicksburg, Shreveport & Pacific Railroad Company could save their "expense bills" (or receipts showing the amount of freight which he had received over that line), and be granted the privilege, within 90 days from date of such receipts, of shipping freight of an equal quantity over the line of the appellant at the "rebilling" rate of $3\frac{1}{2}$ cents per hundredweight. Thus, a merchant receiving a car load of oats over the Vicksburg, Shreveport & Pacific Railroad could within 90 days of that date ship over appellant's line a car load of corn or other grain product without regard to the source from which it was procured. The result of this was that the merchant in Vicksburg who patronized the Vicksburg, Shreveport & Pacific Railroad Company could receive any amount of grain product by barge or otherwise, and keep it stored in his warehouse, with the full

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assurance that he could, at any time within the period stated, have the advantage of this cheap rate over appellant's line, whereas the merchant not dealing with this specially favored "associated line" was denied the same rate; the only condition precedent to the enjoyment of the rebilling rate being that the consignor must first have received an equal quantity of freight over the line of the Vicksburg, Shreveport & Pacific Railroad. The effect of this custom was, as developed by the uncontradicted evidence, that, while the Vicksburg dealer could not deliver grain products at the city of Meridian any cheaper than could the Meridian dealer, he could undersell and make prompter delivery in the towns adjacent to Meridian and by natural location within its territory, being able by operation of this arrangement, to reach Laurel or Hattiesburg three cents per hundredweight cheaper than could the Meridian dealer. So a dealer in Vicksburg, receiving a barge of corn by river, could ship it, under the guise of rebilling, over appellant's road at $3\frac{1}{2}$ cents per 100 pounds, while the Meridian dealer who might also receive a barge of corn at Vicksburg could only ship over the appellant's road by paying the prohibitive local rate of 10 cents per 100 pounds. This statement, brief as it is, is sufficient to demonstrate that the practical working of the so called "rebilling rate" was to give a very great advantage to those receiving freight over the Vicksburg, Shreveport & Pacific Railroad Company, and to unjustly discriminate against all but this specially favored class; the result being that the Vicksburg dealer could with impunity invade the territory adjacent to Meridian, and undersell its dealers at points more distant from Vicksburg, and to reach which it was necessary to pass through Meridian. That this was the inevitable result of the arrangement in question is practically confessed by the appellant, but the force of the admission is sought to be avoided in two ways: First, it is said that the establishing of the rebilling rate was not a voluntary act on the part of the appellant, but that the plan was inaugurated under compulsion by reason of the "threat" and "menace" of the Railroad Commission to put into effect a flat rate of $3\frac{1}{2}$ cents, if appellant declined to adopt the rebilling arrangement herein referred to; that the appellant, while realizing that the rate was unreasonably low, deemed it wiser to endure that ill rather than face other evils which it apprehended might be inflicted by the Railroad Commission. While this is the distinct statement of the witnesses for appellant, we are constrained to hold, in the absence of record proof showing any official action by the Railroad Commission, that the putting in force of the rebilling rate in question was a voluntary act of the appellant. We are strengthened in this view by the uncontroverted statement in the record that, at periods prior to the establishing of the present arrangement, other rates had been in force under which the appellant received no more for its services than it would under a uniform flat rate of $3\frac{1}{2}$ cents. Again, we do not recognize it as a possibility under any contingency that the Railroad Commission of Mississippi would

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or need employ threat or menace to protect the rights of the public from the aggression or extortion of corporations. We rebuke the intimation as an unwarranted aspersion of the Railroad Commission. A state tribunal charged with the duty of exercising "a watchful and careful supervision over the tariffs of charges of every railroad," and of revising "the same from time to time as justice to the public and the railroad may require," is clothed by law with necessary power to achieve the purposes of its existence, without resorting to menace or threat to extort from any corporation subject to its lawful supervision an unreasonable reduction of rates. Nor do we admit that the necessity can ever exist for appellant or any other corporation to submit to unjust or unauthorized regulations by the Railroad Commission of Mississippi, when the courts of the land stand ever open, able, and willing to protect them from any oppressive action. If in fact it be true that the so-called "rebilling rate" establishes an unreasonably low compensation for the transportation of grain and grain products, and the same was inaugurated by order of the commission, then the appellant had a complete and adequate remedy by contesting in a legal way the reasonableness of the rate, and the power of the Railroad Commission to enforce it. We express no opinion, because not involved necessarily in the determination of this particular suit, as to whether the Railroad Commission would have had the authority to establish in the first instance the rebilling arrangement now in force. This record does not show that the rate was established in pursuance of any official order or action on the part of the Railroad Commission. We deal with facts as we find them.

In the next place, it is urged by the appellant that the rebilling arrangement operates uniformly as to all shippers occupying similar positions; that, if discrimination results, it is not on account of the rate itself, but because of differences in the natural advantages incident to location which one shipper has over another. It is insisted that the appellant denies to no one who will comply with its conditions the right to avail himself to the fullest extent of the advantage of the same rate which is granted to other dealers; that if the Meridian dealer will receive freight over the Vicksburg, Shreveport & Pacific Railroad consigned to him at Vicksburg, that he can thereafter, within 90 days, also rebill freight to an equal amount over appellant's line at the same rate given the Vicksburg dealer. And this, it is urged, is a granting of the same privileges to all, and that therefore appellant is not guilty of unjustly discriminating against one, or unfairly favoring another, class of shippers. But the condition prerequisite to the enjoyment of the rebilling rate is, in and of itself, a discrimination. No one is granted the rate who has not first received an equal amount of freight over the Vicksburg, Shreveport & Pacific Railroad, and who can produce "expense bills" paid within 90 days of the proposed shipment; the necessary result being that the Meridian dealer, having no means of disposing of the freight arriving over the Vicksburg, Shreveport

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& Pacific Railroad, cannot accumulate the "expense bills" demanded. Hence such shipper can only rebill the identical commodity and car originally consigned to him, which goes forward and completes one continuous journey. This is a "rebilling" in its true meaning, and no one could justly complain if this plan was strictly enforced and uniformly adhered to. But, as hereinbefore pointed out, the plan now in vogue between the appellant and the Vicksburg, Shreveport & Pacific Railroad Company does not operate fairly or uniformly in this: The Vicksburg dealer, having disposed locally of the original shipments received by him over the Vicksburg, Shreveport & Pacific Railroad, presents his accumulated "expense bills," and "rebills" freight received by him by barge or over the Yazoo & Mississippi Valley Railroad, under a rate cheaper than that granted the general public, to points by location naturally tributary commercially to Meridian. The statement of appellant that if the Meridian dealer will comply with certain required conditions he can enjoy the same privileges, while phrased with specious fairness, is in truth but making an offer of which stress of known and insuperable circumstances prevents acceptance or enjoyment. It is simply tantamount to saying that, if he will become a Vicksburg dealer, then he can have the same rate that other dealers so situate enjoy. This is the one thing that makes the operation of the rule a discrimination in favor of a Vicksburg dealer, and the only fact that gives the Meridian dealer the right to complain.

A "rebilling" rate, to receive the sanction of law, must operate uniformly and fairly, and must be open to all alike. It cannot lawfully be restricted to shippers who live in a certain locality, and who previously receive freight over a certain other favored associated carrier. This consideration alone furnishes conclusive proof that the plan, in this record, courteously termed a "rebilling arrangement," is, in truth, but a flimsy disguise for a plan which operates to the benefit primarily of the Vicksburg, Shreveport & Pacific Railroad Company, secondarily, and perhaps incidentally, to the advantage of the Vicksburg dealer, and ultimately, but inevitably, to the marked damage of the Meridian dealer. In a vague and shadowy way this arrangement is sought to be justified by the officials of the appellant by showing that, in consideration thereof, appellant is granted an extra proportion of freight and certain special privileges as to the use of cars by the Vicksburg, Shreveport & Pacific Railroad Company. It is not shown that the same privileges could not have been obtained from the Yazoo & Mississippi Valley Railroad Company. Nor, except in a most insubstantial manner, is it shown how a car received and unloaded on one day can be utilized in the hauling of another shipment made, perchance, 90 days thereafter, or how it can benefit the appellant, especially in view of the fact that the demand for empty cars must necessarily vary daily according to the pressure of traffic, and it is impossible to foretell what the demand may be at any stated future time. But if these facts be granted, and the moving considerations such as would stand the

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test as a permissible interstate traffic arrangement, still the incurable vice in the arrangement is in the unfair and discriminatory manner in which it is enforced, and the special privileges enjoyed by one, but from which another class of shippers is debarred.

The practical operation of the plan being thus demonstrated as causing a gross discrimination, the next question presented is whether the State Railroad Commission was vested with authority to pass the order, the enforcement of which is now assailed, the effect of the order being simply to convert the then existing so-called "rebilling" rate into an open or flat rate, with the result that all dealers handling grain or grain products in car load lots could enjoy the rate then in force from Vicksburg to Meridian. It will be noted that the rates then in existence were left undisturbed, the only change wrought by the order being to abolish the condition precedent, insisted on by appellant, restricting the rate to the exclusive benefit of such as had received previous and equal shipments over its associated line. The question propounded is easy of solution, in view of the provisions of section 4297, Code 1892. That section authorizes the commission to docket, hear, and determine all complaints made of any tariff of rates, joint or several, made by any railroad or fixed or approved by the commission, on the ground that the charges are for more than just compensation, or that such charges, or any of them, amount to, or operate so as to effect, unjust discrimination. And when, by regular procedure and full investigation, and after hearing proof, the commission is satisfied of the truth of the statement and the justice of the complaint, it is given express authority to give notice to the railroads concerned of any change deemed proper, and to require compliance with such orders. That is the exact legal status of the order presented to us for review. A tariff or rate had been established by the voluntary action of the railroad company; that tariff operated to work unjust discrimination; complaint was made; the proof fully supports the justice and the truth of the grounds on which the complaint is based; that proof satisfied the chancellor, and it satisfies us, that the so-called "rebilling" arrangement was simply a cloak assumed to conceal an arrangement which, while ostensibly granted as a concession to the Vicksburg dealers, was, in truth, devised for the ulterior purpose of fostering the interests of the Vicksburg, Shreveport & Pacific Railroad Company, and perhaps, as it is argued, to maintain present rates to Meridian for the benefit of an associated and connecting railroad at that point. In such state of case the power of the commission to make any change which justice may demand is unquestionably so well established that we deem any citation of authorities, further than a reference to the briefs of counsel, a work of supererogation. It is urged, however, by the appellant, that, inasmuch as its intrastate business only yields a certain stated percentage, less than one-half, of its gross revenues, it does not in fact pay the expenses of maintaining and operating its road within

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the borders of the state, and therefore a reduction of existing rates is an indirect placing of a burden on interstate business, and this is expressly condemned as unlawful by the adjudication of the Supreme Court of the United States. To this argument it is replied by appellee that it is not shown with any degree of certainty the proportionate amount of the gross operating expenses of the railroad company incurred on account of the intrastate business, but this amount is only arrived at by estimation, and therefore this court cannot say as a matter of fact, in the absence of positive proof, that the intrastate business of the appellant does result in a net annual loss; and, as the findings of the Railroad Commission are dealt with as being *prima facie* correct, in the absence of direct proof of error, this court will affirm its findings of facts.

Again, it is stated by the appellant that the hauling of grain and grain products at a flat or open rate of $3\frac{1}{2}$ cents per hundred pounds would produce less than the actual cost of transporting the freight, so that, the more business of this character the appellant handles, the greater its loss; that this, in effect, is the taking of the property of appellant without due process of law; wherefore the order is void as being in contravention of the Constitution of the United States. To this it is replied that the figures shown in the record do not prove that freight handled in the usual and customary course of business, as freight trains are ordinarily constructed, at the rate established, would result in a loss. Again, it is said, in further answer to this contention, that appellant is only entitled to fix such tariff of charges as will yield a fair compensation for the transportation and handling of freight, and assure that the net profits arising from appellant's entire business, after payment of all operating expenses, will pay a reasonable interest on the value of its property; and, as the real value of the property is not disclosed by the record, the appellant has no ground of complaint on this score, and the court is furnished no definite proof to justify a finding of fact that the owners do not receive reasonable returns from their investment. We decline to enter upon a discussion of either question. Neither is necessarily involved in the decision of this case. It might be conceded that the intrastate business of the railroad results in a net loss, and might further be conceded that the transporting and handling of grain and grain products at the rate established may not in actual operation bring a fair remuneration when limited to that one commodity; nevertheless, the rate having been established by the voluntary action of the appellant, it must not be so enforced as to operate as an unjust discrimination against any one. If the appellant chooses to establish as to a certain favored class of shippers a rate so low as to be unremunerative, justice demands, and the law will require, that the rate be granted to all alike. "Special privileges to none" is the rule of action by which common carriers must measure their conduct.

The decree is affirmed.

SOUTHERN RY. CO. *v.* CUNNINGHAM.

(Supreme Court of Georgia, May 15, 1905.)

[50 S. E. Rep. 979.]

Common Law—Presumptions.—Where suit was brought in this state on account of a personal injury occurring in the state of Alabama, and no statute of that state was pleaded or shown, this court will presume that the common law was of force there.

Carriage of Passengers—Degree of Care—Presumption of Negligence.*—At common law, common carriers of passengers were bound to use extraordinary diligence; and injury to a passenger in consequence of the breaking or failure of a vehicle, roadway, or other appliances of the carrier, owned or controlled by it and used by it in the transit, or the manner of their operation, raised a presumption of negligence against it.

Same—Same.—A common carrier of passengers is bound to use extraordinary diligence, no matter what means of conveyance may be employed—whether a passenger train, a freight train, or a mixed train. The standard or degree of diligence required is the same, namely, that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances. But the acts which extraordinary diligence requires to be done are not the same under all circumstances.

Same—Same—Extraordinary Diligence—Definition.†—Extraordinary diligence, as applied to the movement, starting, or stopping of mixed trains, and the jolts or jerks occurring in connection therewith, is that extreme care and caution which very prudent and thoughtful persons would use with a like train under like circumstances.

Same—Extraordinary Diligence—Question for Jury.—In determining whether extraordinary diligence has been used by the company, the nature and character of the train—whether a passenger train, a freight train, or a mixed train—is a circumstance for the consideration of the jury; and, on request to charge the jury in regard to considering the character of the train, the presiding judge should not omit all reference thereto.

*As to the degree of care required of a carrier of passengers, see foot-note appended to *Hart v. Seattle, etc., Ry. Co.* (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; foot-notes appended to *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248.

Presumption of negligence from injury to passenger, see foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; foot-note appended to *Jones v. United Rys. & Elec. Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631; *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292.

†As to liability of railroads for injuries to passengers from jerks and jolts of trains of cars, see foot-notes appended to *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; *Rutledge v. New Orleans, etc., R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488; *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1; *Norfolk & A. Terminal Co. v. Morris' Adm'x* (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

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Injury to Passenger—Contributory Negligence—Jerking of Train.—If a passenger injured by a negligent jerk occurring in the operation of a railway train, by the exercise of ordinary care, could have avoided the consequences to himself of the railroad company's negligence, he would not be entitled to recover. The character of the train and its method of operation, known to the plaintiff, are circumstances for the consideration of the jury in determining whether he exercised ordinary care or not. But a request to charge which would make the exercise of ordinary care on the part of a passenger dependent entirely on what was usual or customary with the railroad, without reference to his knowledge of it or to the circumstances of the particular case, was properly refused.

Duty to Minimize Damages.†—If a passenger was injured by the negligence of the railroad company, he was bound to lessen the damages as far as practicable by the use of ordinary care and diligence. But it would be error to charge that it was his duty to do some particular thing for that purpose.

New Trial.—Grounds of a motion for new trial based upon the refusal of the judge to allow certain questions to be asked furnish no reason for reversal where it does not appear what answers were expected thereto.

(Syllabus by the court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by J. E. Cunningham against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Cunningham brought suit against the Southern Railway Company seeking to recover for an injury to himself. He alleged that he took passage upon a passenger train of the defendant from a point in this state to a place in Alabama; that, when the train reached a station in Alabama, it was pulled into a side track to allow a train coming in the opposite direction to pass; that, after going into the side track, the conductor and other servants of the defendant announced that the train would stand there for half an hour; that plaintiff arose and walked along the aisle to a tank of drinking water which was located at the end of the car, and was kept there for the use of passengers; that, while in the act of drinking, without notice, warning, or signal of any kind, the car was moved suddenly and with great and unusual violence backward, and by said violent motion plaintiff was thrown to the floor and injured. The defendant denied the substantial allegations of negligence. It further pleaded that the train on which the plaintiff was riding was a mixed train, composed partly of freight cars and partly of passenger cars; that this fact was known to plaintiff, and that he assumed all risk incident to traveling on such a train, and that his injury, if any, was in consequence of the necessary movements of said train, which were carefully made, or of negligence on his part, or of unavoidable accident; also that no greater jolts or jars were made than are usual and necessary in handling such trains, and that the move-

†See foot-notes appended to *Louisville & N. R. Co. v. Sullivan Timber Co. (Ala.)*, 13 R. R. R. 836, 36 Am. & Eng. R. Cas., N. S., 836.

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ments were such as were usual and necessary in doing so. The jury found for the plaintiff. The defendant moved for a new trial. The motion was overruled, and it excepted.

Shumate & Maddox and *G. A. H. Harris & Son*, for plaintiff in error.

R. T. Fauche and *M. B. Eubanks*, for defendant in error.

LUMPKIN, J. (after stating the facts). 1, 2. Plaintiff in error insists that as the injury took place in the state of Alabama, and no statute of that state is pleaded or shown, the law of this state requiring extraordinary diligence from carriers of passengers did not apply; that such was not the rule at common law; and that no presumption of negligence arose from proof of injury. The injury having occurred in the state of Alabama, and no statute of that state having been pleaded or shown, the presumption is that the common law is of force there. *Selma R. Co. v. Lacy*, 43 Ga. 461. At common law, common carriers of freight were insurers, and no excuse availed them in cases of loss, unless it was occasioned by the act of God or the public enemies. In determining the status of carriers of passengers, the courts distinguished their position from that of common carriers, and held that they were not insurers of the safety of their passengers, but were liable for negligence causing injury. As to the measure of diligence required of them, various forms of expression were used. In some cases it was said that they were bound to exercise the highest degree of care and skill; in others, that they were answerable for the smallest negligence; in still others, for the least failure in duty; and various other forms of words were employed. A consideration of these decisions will show that the common-law courts required of a common carrier of passengers a degree of diligence which was fully equal to extraordinary diligence, and it has generally been held, that they are bound to use extraordinary diligence. 2 Redfield on Railways (6th Ed.) § 192, and notes; 1 Fetter, Carriers of Passengers, § 8, p. 13; Thompson's Carriers of Passengers, p. 200. On page 206 of the authority last cited the author expresses the opinion that the modern English rule appears to be that carriers of passengers are only bound for the care and caution which may be reasonably expected to be used by reasonable men, reducing the standard to ordinary or reasonable care. But Mr. A. C. Freeman, in an elaborate note to the case of *Ingalls v. Bills*, 43 Am. Dec. 355, 357, argues with great force that there has been no change in the English rule on the subject. At the time of the adoption of the common law into this state the authorities cited will show that extraordinary care was required on the part of common carriers of passengers; and it has been often held that proof of injury to a passenger in consequence of the breaking or failure of a vehicle, roadway, or other appliances owned or controlled by the carrier, and used by it in making the transit, or the manner of their operation, raises a presumption of negligence against the carrier. This construction was placed upon the common law by the Supreme

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Court of this state in *Central R. R. v. Freeman*, 75 Ga. 331, 338, and in *Augusta & Summerville R. Co. v. Randall*, 79 Ga. 304 (9), 314, 4 S. E. 674. In the latter case it is said (page 314 of 79 Ga., page 678 of 4 S. E.): "This presumption that where the plaintiff has shown that he was a passenger, and was hurt or damaged by the running of the railroad company's trains or machinery, the company was negligent, is a common-law presumption. It is no new thing, because it was not enacted in this state until the act of 1855. It obtained at common law, and had been the law of England and of this country all the time." It has been held that, if there has been any diversity in the decisions of different courts on this subject, the construction heretofore placed upon the common law by this court would prevail. *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616; *Krogg v. Atlanta, etc., R. R.*, 77 Ga. 202 (2), 4 Am. St. Rep. 77. But contrast *Atlanta, etc., Ry. v. Tanner*, 68 Ga. 384 (3); *Anderson v. Walton*, 35 Ga. 205. See, also, *Tanner's Executor v. L. & N. R. Co.*, 60 Ala. 621. In the case of *Savannah Ry. v. Williams*, 117 Ga. 420, 43 S. E. 751, 61 L. R. A. 249, however, Lamar, J., says that the presumption as contained in the statute of this state is more extensive than it was at common law.

3-5. "The degree of diligence due from a common carrier [of passengers] to a passenger is extraordinary, no matter what means of conveyance may be employed." *Ball v. Mabry*, 91 Ga. 782, 18 S. E. 64; *Thompson on Carriers of Passengers*, § 20, p. 234; *I. & G. N. Ry. Co. v. Irvine*, 64 Tex. 529 (3); *Fetter, Carriers of Passengers*, § 16, p. 32; *Edgerton v. New York, etc., R. R.*, 39 N. Y. 227; *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187, 196, 4 Am. Rep. 267; *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493; *Chicago & Alton R. Co. v. Eugene Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Ohio & Miss. R. Co. v. Dickerson*, 59 Ind. 317; *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291, 296, 23 L. Ed. 898; *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Schilling v. Winona, etc., R. R. (Minn.)* 68 N. W. 1083. "Extraordinary diligence," as the term is defined and used in this state, means "that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances." *East Tenn., Va. & Ga. Ry. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660; *Civ. Code*, § 2899. The standard or degree of diligence required of a carrier of passengers with respect to a passenger is therefore extraordinary diligence. But what acts will meet this requirement must necessarily depend upon the circumstances of the particular case. See *Macon St. R. Co. v. Barnes*, 113 Ga. 218, 219, 38 S. E. 756. What extraordinary diligence in running a freight train would require to be done may differ from what would be required in operating a passenger train. Thus it has been held that a passenger who sees fit to travel on a freight train takes the risk of the usual and necessary jolts properly incident to handling and running such trains. *Ball v. Mabry*, 91 Ga. 781 (4), 18 S. E. 64; *Crine v. E. T. Ry. Co.*, 84 Ga. 651, 11 S. E. 555; *Central Railroad v. Smith*, 76 Ga. 209,

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2 Am. St. Rep. 31. A freight train is primarily for the carriage of freight. What is called a mixed or accommodation train is somewhat different. It is partly used for the transportation of freight, but also has a passenger car or cars attached to it, and is held out to the world as a regular means for transporting passengers. This does not change the rule announced above—that in all cases extraordinary diligence is required of a carrier of passengers. But in determining what acts were necessary to fulfill this measure of diligence in the particular case, and whether such diligence was used, the nature and character of the train, its known uses, and the necessary incidents of its operation are circumstances for the consideration of the jury. In *Chattanooga, etc., R. R. v. Huggins*, 89 Ga. 495 (5), 15 S. E. 849, it was held that “a railway company, in coupling a freight train to a passenger car having passengers already in it, to be carried by the train, is bound to exercise extraordinary diligence; that is, such diligence as very prudent persons would use with a like train under like circumstances.” In *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 89, 33 S. E. 889, 891, the rule in regard to mixed trains is thus announced: “A passenger who enters such a mixed train, with knowledge of its peculiar structure and movements, assumes the risks consequent upon its unavoidable jerks when starting; and the degree of diligence he should exercise should have reference to such necessary movements of the train. But he has also the right to rely on an exercise of extraordinary diligence by the railroad company in its management of the train in such a way as to avoid danger of injury to its passengers; and, when he has used ordinary diligence for his own safety under the circumstances, the company is liable for damages to him resulting even from its slight neglect.” Compare *Central R. Co. v. Summerford*, 87 Ga. 626, 630, 13 S. E. 588; *Oviatt v. Dakota C. Ry.*, 43 Minn. 300, 45 N. W. 436.

Some of the requests to charge in the case now under consideration were based upon the decision in the case of *Crine v. Railway Co.*, 84 Ga. 651, 11 S. E. 555. They constituted only a part of the charges which were approved in that case, and omitted any reference to the necessity for the use of extraordinary diligence. Exception was taken, however, to the fact that the presiding judge gave no charge in respect to the character of the train, and its usual and necessary modes of operation, in submitting to the jury the question of whether or not the defendant used extraordinary diligence, although requested to charge on that subject. His attention was called to it by the request, and it was error to entirely disregard it.

6. The court instructed the jury, in effect, that if, by the exercise of ordinary care, the plaintiff could have avoided the consequences to himself of the defendant's negligence, he would not be entitled to recover. Ordinary care, as has been said above in regard to extraordinary care, may require one thing at one time and under one set of circumstances, and a different thing at another time and under different circumstances. One of the

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requests to charge was defective, in that it made the question of what would be ordinary care on the part of the plaintiff dependent entirely upon the character of the train and the manner in which it was run and operated, and handled at stations where it was usual to receive and discharge freight. The character of the train and its method of operation, as known to the plaintiff, were circumstances for the consideration of the jury in determining whether he exercised ordinary care or not. But ordinary care is a matter affecting the individual who must use it, and it will not do to say that the standard of diligence on his part depends alone upon the character of the train, or what the usual mode of operating it is, without regard to his knowledge, or whether the jerk was unusual or usual.

7. If the plaintiff was injured by the negligence of the defendant, he was bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Civ. Code, § 3802. But it would have been error to have charged the jury that it was his duty to do some particular thing for that purpose, or to say to them that if he could have "mitigated his suffering by having an operation performed, or other surgical treatment, and could have relieved himself partly or wholly from suffering, it was his duty to take such care." His duty was to use ordinary care and diligence to lessen the damages. But the court could not tell the jury what particular acts ordinary care would require him to do. On this subject, compare *Watson on Damages for Personal Injuries*, § 189; *Blate v. 3d Ave. R. R.*, 44 App. Div. 163, 60 N. Y. Supp. 732; *Collins v. City of Council Bluffs*, 32 Iowa, 324 (3), 7 Am. Rep. 200.

8. The grounds of the motion for new trial which excepted to the refusal to permit certain questions to be asked of witnesses, do not show what answers were expected or would have been given. One of them, moreover, appears rather broadly to ask the witness Hilley to give an opinion whether what he did or what others did was unusual and unnecessary. Where, however, the declaration alleged that the jerk complained of was "with great and unusual violence," and this was denied by the answer, evidence on this subject was admissible. *Ball v. Mabry*, 91 Ga. 782 (4), 18 S. E. 64; *City Electric Railway v. Smith*, 121 Ga. 663, 49 S. E. 724.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

LATOUR et al. v. SOUTHERN RY.

(Supreme Court of South Carolina, May 8, 1905.)

[51 S. E. Rep. 265.]

Carriers—Maltreatment of Passenger—Instructions.—Where an action is brought for maltreatment of a passenger by defendant carrier, and is not based on its failure to make connections with trains of another road, an instruction that railroad companies do not guaranty connections is not reversible error.

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Same—Statements of Ticket Agent.*—Where, on sale of a ticket, the agent stated that the train would make close connections at a certain point, it is not a guaranty of such connection.

Trial—Charge on Facts.—A statement by the court in his instructions, based on admissions in the pleadings, is not a charge on the facts.

Carriers—Rights of Passenger.†—Where a passenger is carried to a place not called for by his ticket, against his will, he is entitled to recover any damages suffered thereby.

Same.—A carrier must exercise such care and effort to avoid delay to a passenger as is due under the circumstances.

Appeal from Common Pleas Circuit Court of Greenwood County; Leroy F. Youmans, Special Judge.

Action by Rosa Latour and her husband against the Southern Railway. Judgment for defendant, and plaintiffs appeal. Reversed.

Sheppards & Grier, for appellants.

T. P. Cothran, for appellee.

POPE, C. J. The plaintiff Mrs. Latour seeks to recover \$1,000 damages of the defendant railway company on account of the negligent, careless, wanton, and willful conduct of the defendant, its agents and officers, in the matter of the treatment of the plaintiff, who was a passenger on one of its passenger trains on the 8th December, 1902. The action came on for trial in the court of common pleas for Greenwood county before Special Judge Youmans and a jury. After full testimony and the charge to the jury, the jury rendered a verdict in favor of the defendant, on which judgment was duly entered. The plaintiff now appeals to this court on the following exceptions:

“(1) It was error in his honor to charge the jury as follows: ‘Now, gentlemen, as to making connections with trains, railroad companies do not guaranty the making of connections. If they sold you a ticket and guaranteed connection, then you would have a cause of action; but they do not guaranty connections,’ the error being:

“(a) In so charging the jury, his honor gave them an entirely incorrect idea of the law of this case, and led the jury to believe that unless the company had guarantied connections at Greenville or Atlanta the plaintiff had no case whatever. The law is that a railway company is charged with the duty of running its train according to schedule time, and can only be excused from so doing by accident, or from causes which reasonable care could not provide against.

*See generally, foot-note appended to *Schmidt v. Cleveland, etc., Ry. Co. (Ky.)*, 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149.

†As to the degree of care required of a carrier of passengers, see foot-note appended to *Hart v. Seattle, R. & S. Ry. Co. (Wash.)*, 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; *O'Brien v. St. Louis Transit Co. (Mo.)*, 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb (Neb.)*, 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; *Rowdin v. Pennsylvania R. Co. (Pa.)*, 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672.

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“(b) In so charging the jury, his honor entirely eliminated from this case the testimony of plaintiff that the agent of the company represented that she would make connection at Greenville at the time of the sale of said ticket; it being respectfully submitted that a railway company is bound by the representations of its ticket agent to the purchaser of a ticket, made at the time of the sale of the ticket.

“(c) It is alleged in the complaint that at the time of the purchase of the ticket defendant represented to plaintiff that she would connect at Greenville, upon which point testimony was offered by plaintiff and her witnesses, and in charging that defendant did not guaranty connections his honor entirely eliminated this testimony and these allegations from the case, and further charged directly on the facts of the case by telling the jury that the defendant did not guaranty connections, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of the case.

“(d) If it be true, as alleged in the complaint and as testified to by plaintiff's witnesses, that defendant did represent to plaintiff at the time of the purchase of the said ticket that she would make close connection at Greenville, it is submitted that this in law amounts to a guaranty which would be binding on the defendant, and his honor had no right to instruct the jury that defendant did not guaranty connections, and in so doing, his honor, in addition to charging on the facts of the case, in violation of the Constitution, which forbids him from charging on the facts, ignored these allegations and the testimony, and also placed an entirely erroneous construction on said allegations and said testimony, the same amounting in law to a guaranty of connection; and his honor should not have submitted this question to the jury.

“(e) The defendant was certainly bound by the representation of its agent, and his honor committed no error to charge that it did not guaranty connections, and further instructed the jury that railroads do not guaranty connections.

“(2) It is further submitted that his honor further erred in charging the jury as follows: ‘The other side claims that she abandoned her trip’ because:

“(a) In so charging the jury, his honor charged on the facts of the case, and stated the testimony to the jury, in violation of the Constitution, which prohibits a circuit judge from charging on the facts, because the answer of the defendant was simply a general denial, but in the testimony of the defendant's witnesses one of the witnesses testified that plaintiff had abandoned her trip.

“(3) His honor erred in charging the jury as follows: ‘She says, if she had been permitted to remain in there, she would have made connection. She says it was all caused by the carelessness, negligence, willful and wanton misconduct of the servant in charge of this train of cars, in ordering her to vacate her seat and take passage in a car that went by Anderson and Seneca.

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You see what she says it was all caused by?" This being a charge on the facts of the case, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of a case, and his honor in charging the jury, in the language herein mentioned, in quoting the testimony to the jury, was charging the jury on the facts of the case, and repeating to the jury the testimony in the case, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of the case, or from repeating the testimony to the jury in his charge.

"(a) In so charging the jury, his honor committed further error, in that he limited recovery to a failure to make connection at Seneca; whereas this is not the only element in said cause of action, and is not the only cause of grievance against said defendant, it being respectfully submitted that one of the elements of said cause of action, and one cause of grievance against the said defendant, was its authorized diversion of the plaintiff from the route indicated by said ticket.

"(b) It is submitted that plaintiff had a right to have submitted to the jury the question of her damage for being carried by Anderson and Seneca instead of by Greenville, and whether or not she would have made connection by going by Greenville is not controlling in the case, because, if her ticket called for Greenville, it was the duty of defendant to carry her there, and its failure so to do gives a good cause of action for damages against the defendant, although, as a matter of fact, it may have carried her to another point where the same connection would have been made; and, in charging the jury as hereinabove complained of, his honor entirely eliminated this element from the case, and makes the whole cause of action depend on failure to make connection.

"(4) It was error in his honor to charge the jury as follows: 'Now, gentlemen, negligence is generally said to be the want of due care.' A railroad is required to exercise care with its passengers. It takes their money and agrees to transport them, and is bound to exercise ordinary care, because:

"(a) A railroad company carrying passengers is required to exercise the highest degree of care known to the law, and it is not sufficient that they exercise only ordinary care.

"(b) A common carrier cannot discharge itself from liability to a passenger by showing that it exercised towards its passenger ordinary care, and his honor committed error in instructing the jury that all that was required of the defendant in this case was to exercise ordinary care.

"(5) His honor further erred in charging the jury that all that was required of the railway company was to exercise such care as a man of ordinary prudence would do, and in making the test that of a man of ordinary prudence or an ordinarily prudent man, it being respectfully submitted that a common carrier of passengers is required to exercise a much higher degree of care towards its passengers than is required of a man of ordinary prudence or an ordinarily prudent man.

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“(6) His honor committed error in charging the jury that the burden of proof was on the plaintiff to show negligence, it being respectfully submitted, in a case of this kind of injury to a passenger, whenever injury is shown at the hands of the carrier, the law presumes negligence, and the burden of proof is then shifted, and the defendant is required to show that it was not negligent in causing the injury, or with reference to the matters complained of as producing the injury; and his honor erred in not so instructing the jury, and in charging that the burden of proof is on the plaintiff throughout to prove every allegation of said complaint, whereas his honor should have instructed the jury that if they believed from the testimony that plaintiff was a passenger, and while in the custody of the defendant as a passenger received injury at the hands of the defendant, or from any agent or instrument under the control of the defendant while a passenger, the law would presume negligence, and, unless defendant overcomes this presumption by a preponderance of the testimony, plaintiff would be entitled to a verdict.

“(7) His honor further committed error in charging the jury as follows: ‘I have listened with great care to this testimony. It has, while not extensive, covered considerable scope. Starting here, the main trouble seems to be, where does that ticket read? ‘The ticket was lost’—the same being a charge on the facts of the case, in violation of the Constitution of the state, which prohibits a circuit judge from charging on the facts of a case.

“(a) In stating to the jury that the ticket was lost, his honor instructed the jury with reference to a matter of fact in the case, in violation of the Constitution and to the prejudice of the plaintiff, because, as the record shows, plaintiff demanded a production of the ticket, which was refused and shown to be in defendant’s possession, and in such a case the presumption of the law is the production of the ticket would have been to the damage of the defendant; and, when his honor instructed the jury, as he did, that the ticket was lost, he entirely relieved the defendant of this presumption of law, and any suspicion which might attach to it by reason of its failure to produce said ticket.

“(b) In saying to the jury, ‘Starting here, the main trouble seems to be, where does the ticket read?’—because, in so charging, his honor instructed the jury with reference to a question of fact in the case, and charged the jury on facts of the case, in violation of the Constitution, which prohibits him from so doing.

“(c) In stating to the jury, ‘Starting here, the main trouble seems to be, where does that ticket read?’ ‘The ticket was lost’—his honor charged the jury on matters of fact in the case, in violation of the Constitution, which prohibits him from charging on the facts of the case.

“(8) His honor erred in charging the jury as follows: ‘Before you can find for her, you must find that they were guilty of negligence, and she must prove it by the preponderance of the evidence’—it being submitted that if plaintiff, who was a passenger, proved injury at the hands of the defendant and while in its

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charge, the law would presume negligence, and she would not be required to prove it by a preponderance of the evidence.

"(9) It was error in his honor to permit the witness Crymes, after plaintiff had closed her case in reply, to answer the following question: 'Mr. Crymes, did either of the tickets you sold to Mr. Latour read by way of Greenville?'—the error being that defendant had closed its case.

"(a) The ticket was shown to have been in the possession of the defendant, and it was the highest evidence of how it read.

"(b) It was error in his honor to hold that, whereas a party declines to produce a ticket, he has the right to offer secondary evidence as to its contents."

We will now consider these exceptions in their order:

1. We should state at the beginning that plaintiff's action is not grounded upon the failure of the defendant to make connection with the train of another road. Plaintiff could have made connection with train No. 37 at Greenville, S. C., on the very morning of the day she made connection with such train No. 37 at Seneca, S. C. Any reference, therefore, in the judge's charge to the law regulating the connections, was a purely groundless act. In order that a judge's charge may work a reversal of the judgment, it must appear that the law embraced in the charge had a direct and effective connection with the case before the court. What harm in a prosecution for assault and battery could a judge's charge on the subject of arson have upon the first prosecution? The judge's charge upon arson might or might not be the law, but his charge would have no reference to an assault and battery, and on that account would be disregarded if appealed from.

(a) There was never any question as to guarantying the connection at Greenville with the Air Line Road. The connection was made by either of two trains on that road, to wit: No. 39, which was due in Greenville at 11:10, and No. 37, at 12:30. The train from Greenwood to Greenville reached the latter at 12:01. The connection with the Air Line Road with train No. 37 was actually made. Granted that the delay was a delay, still the connection was made on that very day.

(b) We do not see that the acting circuit judge eliminated anything in the shape of testimony from this case, so far as the connection at Greenville with the Air Line Railway was concerned; indeed, if the acting circuit judge was to be criticised for anything in relation to the connection at Greenville, we might say that he laid down the law too favorably for the plaintiff.

(c) Nor is there anything in this subdivision "c" which militates against the judgment here sought to be reversed. Granted that the agent at Greenwood, Mr. Crymes, did speak of 10 or 15 minutes' interval between the time of arrival and departure of the trains at Greenville, yet such was the fact as developed by the testimony in the case.

(d) Nor do we see anything in subdivision "d" for while it may be admitted, though it is not, that Mr. Crymes, defendant's

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agent at Greenwood, at the time of the sale of the ticket to the plaintiff, said that she would make close connection at Greenville on that day, and the plaintiff boarded train No. 37 at Seneca, and used the same in her attempt to reach Atlanta in time for the afternoon train towards Detroit. There is therefore no visible connection with the law pertaining to this connection between the parties, so far as any guarantied connection is concerned.

(e) As to "e," as before remarked, any effort on the part of the presiding judge to lay down the law of guarantied connections would have been utterly futile if it had been attempted by him. This exception and subdivisions are overruled.

2. The error of his honor's charge in using the words, "The other side claims that she abandoned her trip," such language was used and based upon plaintiff's admission in her pleadings, which admission went through any testimony bearing upon that point. Therefore it was no issue in the case, and does not belong to the class of cases referred to where the judge is forbidden to charge upon the facts. This exception and subdivision are overruled.

3. The words used by the presiding judge, as referred to in this third exception, are mainly taken from, and it was so announced by the judge himself, the fourteenth paragraph of the plaintiff's complaint. The judge had a right to read the pleadings to the jury. It is no charge upon the facts for a presiding judge to read, in the presence of the jury, the allegations of the complaint which are directly controverted by the answer. It but leads up to a correct apprehension by the jury of the issue between the parties litigant. We do not see how subdivision "a" could have wrought any injury to the plaintiff, for at Seneca the plaintiff and her children were placed on board train No. 37.

Nor as to subdivision "b." We had better remark that our attention was called, in reading the judge's charge, to this question: "Mr. Cothran: I wish your honor to instruct the jury that even if her ticket read via Greenville, and the passenger was deflected, diverted to another route, that the plaintiff is not entitled to damages, unless, under the allegation of the complaint, the jury believed from the evidence that, if the passenger had been carried the route called for by her ticket, she would have made connection, which she did not make at the other point." This matter was then argued pro and con. "Court: Gentlemen of the jury, I charge you that, if she bought that ticket by the way of Greenville, whether she would have missed connection, whether it was the best and most commodious route or not, she had the right to be carried by Greenville, unless she consented to go by a different route; and if by the diversion, without her consent, any damages were caused to her, whether in making connection, or any other inconvenience alleged in this complaint, she is entitled to a verdict." Now, in view of this language, what error could be imputed to the presiding judge on this particular line? This exception and the subdivisions are overruled.

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6, 8. The respondent suggests that the error into which the appellant seems to have fallen arises from the appellant's confusing this with an action for personal injury received by a passenger, for he says in such case the proof of an injury by some instrumentality of the carrier raises a presumption against the carrier, but this is no such case; indeed, in our judgment, the presiding judge very properly held that the allegations made by the plaintiff and denied by the defendant must be proven by the plaintiff. These two exceptions are overruled.

7. As to the seventh exception, it seems to us that this exception and its subdivisions cannot possibly lead to a reversal of the judgment here appealed from. There was nothing to which the testimony of the plaintiff had been directed, and the presiding judge, in his charge, which was quoted but a while ago, gave her full benefit of the ticket being by way of Greenville. This exception is overruled.

9. The ninth exception could lead to no important results. It is very evident that both parties to the contention saw the importance of the ticket purchased by plaintiff being "by way of Greenville." No harm resulted to either party thereby. This exception is overruled.

4, 5. The fourth and fifth exceptions relate to the following instructions to the circuit judge: "Now, gentlemen, negligence is generally said to be the want of due care. A railroad is required to exercise care with its passengers. It takes their money and agrees to transport them, and are bound to exercise ordinary care. Well, where a man is doing anything and does not exercise such care as an ordinary prudent man would do—understand me, such care as an ordinary prudent man would do—if he does what any ordinary prudent man would not, that is an act of commission. The other is of omission. If he neglects to do what an ordinary prudent man would do, that is negligence, and it is the usual test laid down. Now, gentlemen, that is a matter for you, Did the railroad exercise ordinary care? Did it do any act that an ordinary prudent person, assuming the responsibility, would not have done, or did it neglect to do any thing an ordinary prudent person would have done? If it did, it is guilty of negligence, and if damages resulted either by the omission or the commission, and such damages resulted therefrom, was the proximate cause—that is, the nearest cause—the party is liable for such damages as done; is liable for damages."

The complaint charged that, on the journey from Greenwood to Atlanta, the plaintiff, while waiting for the connection at Seneca, "was forced and required by the said defendant to remain for more than four hours in a cold room, and without sufficient accommodations for herself and children," and that from this and other negligence of the defendant she "suffered great mental strain, worry, and anxiety, and sustained on account thereof a severe nervous shock, to such an extent that she

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was made sick and ill, suffered great pain on account thereof," etc.

After the railroad had received the plaintiff as a passenger for transportation, it was charged, not with ordinary care, as the circuit judge charged, but with the highest degree of care for her safety and exemption from injuries and unnecessary exposure, and there was some evidence of neglect of duty by the defendant in this regard. Even, however, if the charge is applied only to the duty of the railroad company to transport passengers on their advertised schedule time, it was erroneous. Railroads are exclusively relied on for all long-distance travel. General uncertainty as to the time of running trains must necessarily, therefore, retard the progress of business enterprises, and must materially affect the prosperity of the country. Business engagements of the greatest moment often depend on the promptness of railroads in running on their schedule time. It is therefore reasonable that something more should be required of them in this regard than the diligence and care which an ordinary prudent man would exercise in the conduct of his own affairs. Nevertheless, safety and promptness are not to be put on the same plane, for promptness must always yield to safety. The sound and reasonable rule is to require that care and effort to avoid delay which is due under all the circumstances. In considering what is due care and effort, consideration is to be given to the immense public importance of prompt departure and arrival of trains, the ability of the particular railroad to meet the demands upon it, the degree of diligence in having engines and cars sufficient for the business of the roads, and any other facts that would tend to establish or disprove due care. A somewhat careful examination of the authorities leads to the conclusion that this is the sound principle, and that any effort to state a more definite rule would lead to confusion. 6 Cyc. 687; note to *Hansley v. R. R. Co.*, 32 L. R. A. 543; *Gordon v. R. R. Co.* (N. H.) 13 Am. Rep. 97.

The fourth and fifth exceptions are therefore sustained, and the cause is remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. MYER.

(Supreme Court of Arkansas, April 22, 1905.)

[86 S. W. Rep. 999.]

Connecting Carriers—Injury to Goods Shipped.*—A connecting

*See *Sykes v. St. Louis & S. F. R. Co.* (Mo.); 9 R. R. R. 772, 32 Am. & Eng. R. Cas., N. S., 772 (duty of intermediate carrier to inspect cars); note appended to *Louisville & N. R. Co. v. Tennessee Brewing Co.* (Tenn.), 4 Am. & Eng. R. Cas., N. S., 661; *Corso v. New Orleans & N. E. R. Co.* (La.), 5 Am. & Eng. R. Cas., N. S., 43; *Shea v. Chicago, R. I. & P. Ry. Co.* (Minn.), 68 N. W. 608, 5 Am. & Eng. R. Cas., N. S., 695.

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carrier which receives a car, apparently in good condition, of vegetables, and promptly transports and offers it to the consignee, thereafter retaining it at the consignee's request, is not liable for the freezing thereof because of a defect in the car furnished by the initial carrier.

Appeal from Circuit Court, Craighead County, Jonesboro District; Allen Hughes, Judge.

Action by Max Myer against the St. Louis Southwestern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The appellee on the 11th day of September, 1902, instituted this action, and alleged that his merchant in St. Louis, Mo., delivered to the appellant a car load of potatoes destined to Jonesboro, Ark., and that they were negligently loaded into a car out of repair; that the car leaked, and when the potatoes arrived at Jonesboro a large portion of them were frozen and rendered worthless and damaged to the plaintiff in the sum of \$200. The appellant, answering, denied that it received the car load of potatoes from the appellee's merchant in St. Louis, and alleged that on the evening of the 15th of December, 1901, it received at Gray's Point from its connecting carrier, the Illinois Railway Company, the car load of potatoes in a refrigerator car, which was under seal, and that the car was offered to the appellee on the 16th of December, 1901, and he refused and neglected to receive it until the 23d of December. The appellant denied that it did not safely deliver said potatoes, denied that it loaded them, denied that it negligently carried them, denied that the car in which they were shipped was out of repair, denied that the car leaked, denied that the potatoes were covered with either ice or snow when they were delivered to the appellee, and denied that the potatoes were injured in any way while in its possession.

The undisputed evidence discloses that the potatoes arrived in East St. Louis, Ill., November 19, 1901, in an Illinois Central car (No. 52,317), in bulk, and remained in it until December 13th, when they were unloaded, sacked, and put back in the same car by the consignors, and on the same day forwarded over the Illinois Central Railway to Jonesboro. Two days later, at 10 o'clock a. m. December 15th, the car was delivered to appellant at Gray's Point in apparent good order, both as to the car and to the contents. It forwarded it, and the car reached Jonesboro at 6 o'clock a. m. December 16th, was set out on team track on same day, where it was customary to deliver freight of that character, and the appellee was notified. He assigned two reasons for not unloading them: First, the weather was cold; second, he did not need them "any sooner." They remained there on the track in the car until December 23d. The weather was cold—about 5 above on the 15th and 16th, and dropped down to zero in St. Louis on the 18th, and 3 below on the same day at Corning, Ark. The potatoes were stored in this particular car for a period of 34 days. It was admitted that the defendant's

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line extends north to Gray's Point only, and there connects with the Illinois Central Railway, and the defendant has no warehouse at Jonesboro suitable to store perishable goods in cold weather, and it was not the custom for railroads in this part of the country to provide warehouses for storing goods in cold weather. These facts were known to appellee. He had a warehouse constructed with a view of protecting potatoes and other perishable goods. But he requested appellant to let the potatoes remain in the refrigerator car until the weather moderated, it being then so cold that he feared the potatoes would freeze before they could be removed and stored in his own house. Appellant consented to this. It was shown that a refrigerator car, properly constructed, would preserve such goods indefinitely. When the car was opened, about seven days after it arrived at Jonesboro, the potatoes were found to be wet, frozen, and rotten. There was evidence tending to support the verdict as to the quantity and value of the potatoes lost.

The instructions of the court are not called in question.

S. H. West and J. C. Hawthorne, for appellant.

WOOD, J. (after stating the facts). The presumption of negligence arising from the condition of the potatoes at the time of delivery is fully explained by the evidence. The proof shows that appellant was not negligent either as warehouseman or carrier. There was no delay in the transportation of the potatoes after they were received by appellant. Appellant had them in its possession as carrier only one day. There was nothing in the appearance of the car when received by appellant to put it on notice of the defective condition. It was in apparent good order. It was furnished to appellee by the Illinois Central. The consignors of appellee received it at St. Louis, and sacked and reloaded the potatoes into it, and it was then delivered by the Illinois Central to appellant, as the last and connecting carrier, in apparent good condition, and transported by it promptly from Gray's Point to the place of destination, and there promptly offered to appellee, who requested that appellant keep it, which was done. It appears to us, if there be any actionable negligence in this case it was in the furnishing of a defective car, and for that appellant was in no wise responsible.

Reversed and remanded for new trial.

 LOUISVILLE & N. R. CO. v. WILSON.

(Supreme Court of Georgia, May 15, 1905.)

[51 S. E. Rep. 24.]

Dead Bodies—Interest of Widow.—A widow has an interest in the unburied body of her deceased husband which the courts will recognize.

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Carriers—Negligence—Protection of Dead Body.*—Where a declaration alleged that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; that the agent of the company at the initial point would only sell her transportation for the body to the junction, but told her that the company would carry the body to the place of burial, and that at the point of junction she could obtain transportation to the destination; that she paid for such transportation to the junction, and delivered the body, with its accompanying shroud and coffin, to the company; that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would be protected from the weather; and that the coffin and shroud were damaged to the extent of \$75, and the body was "soaked and otherwise mutilated"—held, that the declaration set out a cause of action. (Syllabus by the Court.)

Error from Superior Court, Warren County; P. E. Seabrook, Judge.

Action by P. Wilson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Penina Wilson brought suit in the superior court of Warren county against the Louisville & Nashville Railroad Company, a foreign corporation and the lessee of the Georgia Railroad & Banking Company, a corporation under the laws of Georgia. She alleged that the defendant company had damaged her in the sum of \$2,000 for the following reasons: On or about the 12th day of March, 1903, her husband, Hamp Wilson, died in Atlanta, Ga. After his death she delivered his body to the defendant company, to be carried from Atlanta to Warrenton, Ga., where it was to be buried. Defendant has a railroad and operates trains between said places. She notified the defendant that she was going to carry her husband's body to Warrenton, and offered to pay the defendant for the transportation thereof. The agent at Atlanta refused to sell the transportation further than to Camak, a junction point on the defendant company's road. Petitioner paid defendant for the transportation to Camak, and informed it that she was going to carry the body of her husband on to Warrenton. The said agent informed petitioner that the body of her husband would be carried by the defendant company, and that she could buy transportation from Camak to Warrenton. Defendant agreed to transport the said body of petitioner's husband from Atlanta to Warrenton, and accepted pay therefor. When defendant company's train bearing the body of her husband arrived at Camak, in the county of Warren, the coffin containing it was taken from the train by the defendant company and placed on an open platform, and there allowed to remain

*See Louisville & N. R. Co. v. Hull (Ky.), 3 R. R. R. 56, 26 Am. & Eng. R. Cas., N. S., 56; note, 10 R. R. R. 498, 33 Am. & Eng. R. Cas., N. S., 498.

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several hours until defendant's train going to Warrenton arrived. When the said body was taken from the train it was night and raining. Petitioner and others requested the agent of the defendant company at Camak to have said body placed where it would be protected from the rain and weather, but he refused to do so. Petitioner shows that as a result the said body of her husband, the shroud, and coffin were soaked and otherwise "mutilated." By reason of the facts above set forth, said coffin and shroud were damaged to the amount of \$75, and she was subjected to great humiliation and shame and mental suffering. Defendant was a common carrier. She charged that it was wanting in ordinary care and in fact was grossly negligent. She also alleged a property right in the coffin and shroud. The defendant company demurred generally to the petition. The court overruled the demurrer, and to this ruling the defendant excepted.

Jos. B. & Bryan Cumming, for plaintiff in error.

L. D. McGregor, Burton Smith, and J. A. Branch, for defendant in error.

LUMPKIN, J. (after stating the facts). Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes. It is said that burials in church yards was introduced into England by Cuthbert, archbishop of Canterbury, in the year 750 A. D. At an early date the church began to take jurisdiction in regard to places of burial and the sepulture of the dead. This jurisdiction gradually became more enlarged and more firmly fixed, until the ecclesiastical courts left little for the common-law courts to decide upon the subjects. Thus it was that Lord Coke said that the burial of a corpse belonged to ecclesiastical cognizance, but the heirs had an action for defacing the monument (1 Inst.

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4, 18 B; 3 Inst. 203); and so it was that Blackstone made use of the much quoted expression: "But, though the heir has a property in the monuments and escutcheons of his ancestors, yet he had none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb the remains when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it would be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral." 2 Bl. Com. 429. See Hammond's Ed. 651, and note on page 653.

The subject of the right of burial and the protection of the bodies of the dead arose in the matter of the widening of Beekman street in the city of New York, and was referred to Hon. Samuel B. Ruggles, as referee. He made a learned and elaborate report, which was confirmed by the court. It will be found published in 4 Brad. R. 503 et seq., and from it the following excerpts are taken: "The power thus exercised by the ecclesiastical tribunals was not spiritual in its nature, but merely temporal and juridical. It was a legal, secular authority, which they had gradually abstracted from the ancient civil courts, to which it had originally belonged; and that authority, from the very necessity of the case, in the state of New York, must now be vested in its secular courts of justice. The necessity for the exercise of such authority, not only over the burial, but over the corpse itself, by some competent legal tribunal, will appear at once, if we consider the consequences of its abandonment. If no one has any legal interest in a corpse, no one can legally determine the place of its interment, nor exclusively retain its custody. A son will have no legal right to retain the remains of his father, nor a husband of his wife, one moment after death. A father cannot legally protect his daughter's remains from exposure or insult, however indecent or outrageous, nor demand their reburial, if dragged from the grave. The dead, deprived of legal guardianship, however partial, which the church so long had thrown around them, and left unprotected by the civil courts, will become, in law, nothing but public nuisances; and their custody will belong only to the guardians of the public health, to remove and destroy the offending matter with all practical economy and dispatch. The criminal courts may punish the body snatcher who invades the grave, but will be powerless to restore its contents. * * * The sacred relics of Mt. Vernon may be torn from their 'mansion of rest,' and exhibited for hire in our very midst, and no civil authority can remand them to the tomb. * * * It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. * * * The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where

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would he find the legal right to resist, except in his peculiar and exclusive interest in the body? The right to the repose of the grave necessarily implies the right to its exclusive possession." The report of the referee has been criticised by a writer in 10 Cent. Law J. 303; but it has been cited with approval by nearly all the courts which have since dealt with the questions there involved. It is said Mr. Ruggles added a note to the original report in explanation of the term "next of kin," stating that it "was not employed for the purpose of denying or questioning the legal right of a surviving husband to bury his wife's remains, or to reinter them if disturbed." *Hackett v. Hackett*, 18 R. I. 157, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762. For those who desire to consult law literature on burial grounds, burials, etc., an extended list will be found in a note to 18 Abb. N. C. 75. In *Pierce v. Proprietors of Swam Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, it was held that, "while a dead body is not property in the strict sense of the common law, it is quasi property, over which the relatives of the deceased have rights which the courts will protect." Potter, J., delivered an able opinion in that case, reviewing the matter both from the standpoint of history and of authority. In *Lawson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, it is held that "the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it—such as an unlawful mutilation of the remains—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved." In *Bogert v. City of Indianapolis*, 13 Ind. 135, it was held that "the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." In *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249, it was held that "where a husband and wife employed undertakers to keep the body of a deceased daughter until they might be ready to inter it, and the defendants negligently took or allowed it to be taken and buried, or otherwise disposed of it, an action for damages would lie." In *Doxtator v. Railroad Company* (Mich., 1899) 79 N. W. 922, 45 L. R. A. 535, a similar rule was recognized, but a recovery was denied on other grounds. See, also, 6 Am. L. Rev. 182; 8 Am. & Eng. Enc. Law (2d Ed.) 835; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762, *supra*.

In this state the right of the owner of an easement of burial in a cemetery lot, or one who is rightfully in possession of it,

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to recover damages from a person who wrongfully enters upon it and disinters the remains of persons buried therein, has been recognized; and it was held that in a suit for wrongfully disinterring a dead body, if the injury has been wanton and malicious, or the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; *Roumillot v. Gardner*, 113 Ga. 60, 38 S. E. 362, 53 L. R. A. 729. In *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621, it was held that an unlawful and unwarranted interference with the exercise of the right of burial was a tort, which gave to the grandmother and brother of the deceased, who were proceeding to have the corpse interred, a right of action; and the same ruling was made with respect to the damages recoverable as in the case of *Jacobus v. Congregation of the Children of Israel*, *supra*. From these decisions it will be seen that in Georgia, where ecclesiastical courts have never been recognized, rights with respect to burial, cemeteries, and dead bodies are protected by the secular courts. Indeed, if this were not so, and if all matters which were cognizable by the ecclesiastical courts and thus withdrawn from the common-law administration could not be dealt with by the courts of this state, many most important rights would be left unprotected. Thus until a comparatively recent date in England the jurisdiction of the ecclesiastical tribunals included, among other things, cases of marriage, divorce, and testamentary causes. In *Turner v. Thompson*, 58 Ga. 271, 36 Am. Rep. 297, it is said: "Our own statute, which adopted the English common law and the old English statutes, adopted them only where applicable to our people in this new country, and the circumstances surrounding them here."

Some courts have quoted the statement from Blackstone set out above, and announced in broad language that a dead body is not the subject of property. But when particular cases arose, it generally became necessary to hold that a husband or wife, or next of kin, did have an interest in the body of the deceased which the law would protect, whether that interest and the right of control and possession was technically denominated property, or quasi property, or by some other name. If this is not true, for stealing or wrongfully withholding the custody of a dead body there might be an action for damages in some cases, but no method of recovering or restoring the body to its proper resting place. An illustration of the class of cases just referred to is *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. This decision announced that a dead body was not the subject of property, and that after burial it became a part of the ground to which it had been committed. Yet, for an improper disinterring and removing of the remains it was held that an action of

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tort "in the nature of trespass quare clausum fregit" would lie, and, if there was a willful disregard or careless ignorance of the plaintiff's rights, the injury to his feelings might be considered in measuring damages. Nevertheless the same court held at a later date that "an action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fall on the ground that there was no right of property in the dead body." In the decision of the case of *Meagher v. Driscoll* is cited, not as conflicting with, but rather supporting, the latter adjudication. *Burney v. Children's Hospital* (Mass., 1897) 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273.

If, then, there is a property right, or a quasi property right, in a dead body, subject, of course, to the necessity for proper disposition, and not to allow it to become a nuisance or injurious to the public welfare, what is the status of the defendant company, which undertook to transport it for hire? In *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850, it was held that a declaration by a widow against a railway company for negligence in the delivery of the body of her husband shipped upon such railway, causing delay in the funeral, by reason of which decomposition resulted, set out a cause of action. In *Beam v. Cleveland Ry. Co.*, 97 Ill. App. 24, it was held that "a brother of a deceased person, who undertakes to pay for the transportation of his body from the place of his death to that of his burial, has such an interest in the dead body as entitles him to damages for an injury to it by the negligent act of the railway while transporting it for hire." This was not a decision of the highest court of the state, but is, nevertheless, a decision which may be properly cited and considered. In *Hockenhammer v. Lexington & Eastern Ry. Co.* (Ky., 1903) 74 S. W. 222, a suit was brought against the railway company for striking with one of its trains a wagon containing the corpse of a child and throwing it to the ground. On the subject of the right of the father in regard to the corpse or his child, after citing various authorities, it is said: "We therefore conclude that the great weight of authority sustains the rule that there is a legal right in the bodies of the dead, which the courts will recognize and protect by the proper action, as the case may be." The recovery was denied on the ground that the petition did not allege any injury to the corpse. It was said that if the child had been alive, and was simply thrown down, but not hurt, there could have been no recovery, and that a like rule would be applied by analogy to its body. See, also, *Perley on Mortuary Law*, 103.

Apparently conflicting with these various adjudications, in *Griffith v. R. Co.*, 23 S. C. 25, 55 Am. Rep. 1, it was held that "an administrator has no property in the cadaver of his intestate, and therefore cannot maintain an action for its willful and negligent mutilation, but he may sue for injury to the wearing ap-

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parel of the deceased." In that case a man was murdered, and his corpse placed on a railroad track to conceal the crime, and it was run over and mutilated by the trains. It also involved the review of a reversal by the judge of a referee's report, on the ground that the alleged negligence had not been proved. The direct ruling on the subject of property rights in regard to a dead body was that the administrator had no such right. This was said to be "the precise point before us; i. e., the rights of the administrator" under the statute of South Carolina. In the course of the decision Simpson, C. J., makes use of the following language: "But can there not be a qualified property in the deed—one which gives control to some one, with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead, and that, when the life escapes, the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound in life by the tenderest of ties can invoke the aid of no court in preventing its mutilation? And must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition. And yet such seems to be the fact, at least the matter is left in great doubt, so far as our limited examination of the cases, both in this country and in England, amid the press of our duties, has enabled us to ascertain. Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered." We cannot concur in this language as applicable to a husband or wife under the laws of Georgia. The principle that for every right there shall be a remedy has been embodied in our Code and adopted as statute law (Civ. Code 1895, § 4829), although it was, long before the adoption of our Code, announced by distinguished jurists. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 240, 14 Am. Rep. 667, *supra*.

In the present case it is not necessary to enter into a discussion as to whether the defendant could have been compelled or not to receive this corpse for transportation, or on what agreement. The plaintiff alleges that the defendant did receive it and agreed to transport it for hire. Nor is it necessary to discuss the difference between carriers and common carriers, or whether railroad companies are generally common carriers of corpses, as argued in the brief of counsel for plaintiff in error. The declaration in effect alleged that the plaintiff delivered the body of her husband to the defendant, a common carrier, to be carried from Atlanta to Warrenton, where it was to be buried; that she notified the defendant of this intention, and offered to pay for transportation between the two places; that defendant's agent at Atlanta refused to sell her transportation further than Camak, a junction on its road, but informed her that the body would be carried by the defendant, and that she could buy transportation from Camak

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to Warrenton, and that she paid the transportation to Camak; and that defendant agreed to transport the body from Atlanta to Warrenton, and accepted pay therefor. Under these allegations, it will be seen that it was not in contemplation either of the plaintiff or of the defendant that there should be a final delivery or removal of the body, with its accompanying coffin and shroud, at this junction, but its temporary stop there was merely to await the defendant's other train to the place of destination. It was not the intention of either party that the body should merely be shipped to Camak, and there stopped. Fairly construed, the allegations of the declaration mean that the body was to be transported from Atlanta to Warrenton, that both parties so understood and agreed, that as a part of the through transportation between these two points payment was made to the junction, and that payment was to be made from that point on to Warrenton. At Camak, the point of junction, therefore, the depositing of the coffin upon the defendant's platform did not constitute a final delivery to the plaintiff which would exempt the defendant from all further duty or liability. Plaintiff alleges that she offered to pay the entire transportation, and there is nothing to indicate that she was not ready to pay the second part of it, or that any act on her part changed the duty of the defendant. It certainly cannot be said by the defendant company that a corpse is sufficiently property for a railroad company to receive and accept pay for its transportation, but is not sufficiently property to authorize a recovery for a breach of duty arising therefrom, or to prevent any duty from arising under such circumstances. If it received this body to be transported for hire, it was bound to discharge the duties arising from so doing, and for a failure to do so would be liable to an action. We do not know what facts the evidence may establish upon the trial, but we hold that, under the allegations of the declaration, which, as against a demurrer, are to be taken as true, a cause of action was set out. Civ. Code 1895, § 2279. Not only negligence, but gross negligence, is alleged.

The demurrer, being general, and not special, does not raise the direct question as to the measure of damages, or the extent to which there may be a recovery, if one is had. We will, therefore, not discuss the measure of damages further than to say that this case does not fall within the ruling in *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, where it was sought to recover from a telegraph company damages on account of mental pain and suffering alone, alleged to have resulted to the plaintiff from failure of the company to deliver a message in due time. Here the action is for a tort, and there is an allegation of actual pecuniary damage to the coffin and shroud, and of injury to the body. So that, as to this point, the case is quite similar to those of *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, and *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141, *supra*.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

ST. LOUIS & S. F. R. CO. v. MARSHALL.

(Supreme Court of Kansas, June 10, 1905.)

[81 Pac. Rep. 169.]

Carriers—Lighting Station—Injury to Passenger.*—The character of lights which a railroad company is required to furnish at a station for safety of passengers depends on the character and extent of business transacted there.

Same—Instruction.—The statement, in the instruction in an action for injury to a passenger at a station, claimed to be due to improper lighting, that light which would be sufficient at one station might be inadequate, serves merely to fix the attention of the jury on the peculiar facts of the case.

Error from District Court, Linn County; W. L. Simons, Judge.

Action by Carrie E. Marshall against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

L. F. Parker and Pratt, Dana & Black, for plaintiff in error.

Boyle & Guthrie and John C. Cannon, for defendant in error.

PER CURIAM. The principal questions argued by the plaintiff in error in this case depend for their solution upon disputed matters of fact. The duty of the company with reference to the care to be observed in the maintenance of its station and the conduct of its business is really not controverted. It is true, as the court said, that the proper character of the lights furnished at any particular station will depend upon the character and extent of business transacted at the station. If many passengers are to be taken on the trains and many others are to be discharged, if much baggage, mail, and express is to be handled by many employees, if the station grounds must be used at the time of the arrival of trains by many persons having business there with the company or with incoming or outgoing passengers, confusion and accident at night can be prevented only by the aid of a lighting system much more extensive than would be required under other circumstances. The further statement by the court that light which would be sufficient at one station might be inadequate at a larger one, instead of opening a field for comparison, served merely to fix the attention of the jury upon the peculiar facts of the case on trial. The statement that it was the duty of the company to furnish lights sufficient to guide the steps of a passenger safely was immediately explained, and twice explained to mean with reasonable safety.

The definition of negligence was, by the instruction as a whole, entirely relieved from the quality of abstractness, and its true bearing upon the evidence made apparent.

This court is not the body to solve the conflict in the evidence as to how the mail bags were handled, and where they were left.

*See monograph, 2 R. R. R. 136, 25 Am. & Eng. R. Cas., N. S., 136

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Neither can this court, from the bare record, declare as a matter of fact that a mail bag did not trip the deceased, or announce as a proposition of law that it was not negligence in the company to permit the injured man to be tripped by it. There is evidence that the station was reasonably well lighted. There is other evidence that it was so dark that it was dangerous. The jury has decided the matter, and its conclusions must stand.

It is impossible, from all the circumstances of the occurrence, for this court to say that light would not have been a protection to the deceased. The question is a debatable one. But, even if the court might have an opinion, derived from the words in the record, different from that of the jury, it does not have the illustration given by one of the witnesses of the movements of the deceased, nor the illuminating effect attaching to oral recitals of the facts by those who observed them. There is fair evidence that the darkness made the deceased oblivious to his peril, and that is sufficient to uphold the conclusion of the triers of fact. The whole conduct of the deceased was a matter for the jury to approve or condemn, according to the interpretation which the facts, in their estimation, required. The custom pleaded and proved was shown to be known and understood by the company, and amounted to an adoption by it of the results of interference by third persons with mail bags at its station.

The claimed variance would scarcely be material even in a criminal case.

The instruction concerning the measure of damages, considered in its entirety, could not have prejudiced the defendant; and the conduct of a juror, complained of, was not sufficiently flagrant to warrant the court in annulling the verdict.

Other matters discussed in the brief are inconsequential, and the judgment of the district court is affirmed.

DORR CATTLE CO. v. CHICAGO & G. W. RY. CO.

(Supreme Court of Iowa, June 14, 1905.)

[103 N. W. Rep. 1003.]

Additional Testimony—Discretion of Trial Court.—Permitting plaintiff to introduce additional testimony after he has rested, and defendant's motion for a directed verdict has been made and overruled, is within the discretion of the trial court.

Carriage of Live Stock—Delivery at Infected Yards—Knowledge of Carrier.—Evidence that a railroad had unloaded several cars of "ticky cattle," under quarantine regulations, at certain yards prior to the time it unloaded plaintiff's cattle at the same yards, was sufficient to carry to the jury the question of the railroad's knowledge or imputed knowledge that the yards were infected.

Same—Same—Same—Pleading.—A petition alleging that defendant railroad, through its "carelessness and negligence," placed plaintiff's cattle in certain yards, and wrongfully exposed them to infection, was sufficient to raise the issue of defendant's knowledge or imputed knowledge that the yards were infected.

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Expert Testimony—Failure to Show Facts—Waiver.—Where an expert was permitted to answer a hypothetical question on a promise from plaintiff's counsel that he would show the facts upon which it was based, plaintiff's failure to show all the necessary facts was waived by defendant's neglect, after plaintiff's effort in that direction was completed, to move to strike the answer.

Carriage of Live Stock—Delivery at Infected Yards—Contributory Negligence—Evidence.—In an action against a railroad for negligently delivering cattle at yards infected with Texas fever, evidence of a notice given by plaintiff to defendant as to what the former intended to do with the cattle after it learned of their infection, and giving defendant the right to make other disposition thereof if not satisfied, was admissible as bearing on plaintiff's conduct with reference to the animals after it became aware of their exposure.

Same—Quarantine—Evidence.—Daily reports of cattle reloaded at Kansas City from southern cattle pens, bearing the signatures of live stock agents, inclosed in envelopes addressed to the government veterinarian at Des Moines, and notifying him, according to practice, of cattle shipped in quarantine, are inadmissible in evidence where the signatures are not proven, and it is not shown that there is any such office or officer as live stock agent at Kansas City, nor that the reports were issued by such agent, nor that they belong to any public office, or are required to be kept by any officer.

Judicial Notice—Live Stock—Contagious Diseases.*—Courts take judicial notice that Texas or splenic fever is infectious or contagious, and a railroad transporting cattle is chargeable with notice of that fact.

Appeal from District Court, Polk County; A. H. McVey, Judge.

Action at law to recover damages as a result of defendant's placing six car loads of cattle belonging to plaintiff in certain yards in the city of Des Moines, which it is claimed were infected with Texas fever. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Reversed.

Carr, Hewitt, Parker & Wright, for appellant.

Bowen & Brockett, for appellee.

DEEMER, J. In the year 1902 plaintiff shipped six car loads of cattle from some point in Texas to Des Moines, Iowa. The defendant received the cattle at St. Joseph, Mo., and brought them to their destination. When they arrived at the latter place, defendant took them to what are known as the "Union" or "Agar" Stock Yards, and there unloaded them, where they were kept for some days. It seems that these yards were infected with Texas or splenic fever, and that on account thereof plaintiff was compelled to ship them his cattle under United States government quarantine regulations to Chicago, and there sell them for immediate slaughter, at a greatly reduced price. For the damages thus sustained it brought this action.

It appears that, although the cattle were billed and shipped to Des Moines, plaintiff requested that they be unloaded at Milman,

*For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-note appended to *McGrew v. Missouri Pac. Ry. Co. (Mo.)*, 9 R. R. R. 855, 32 Am. & Eng. R. Cas., N. S., 855.

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a small station a short distance from Des Moines, where it had theretofore had cattle delivered by the defendant; but for some reason—the exact one being a matter in dispute—they were brought on to Des Moines, and placed in the yards above referred to. It is also contended that defendant had other yards in the city of Des Moines at which the cattle might have been unloaded, but that it carelessly and negligently placed them in the Agar yards, without plaintiff's knowledge or consent. During the spring and summer of the year 1902 the Agar Packing Company had been using the yards above referred to for confining stock which had been exposed to Texas fever, and which it is claimed were shipped to it under quarantine regulations of the United States government from various points in Texas. These were shipped for immediate slaughter, and were disposed of according to law. One or more shipments made to the packing company had come over the defendant's lines, and it had taken care of the cattle and of its cars in accord with the government regulations. On account of the nature of the business carried on in the Agar Yards, a veterinary surgeon was placed in charge thereof by the Department of Agriculture, in order that all quarantine regulations might be enforced. As soon as plaintiff's cattle reached the Union or Agar Yards they were placed in quarantine by the government official, and were finally disposed of pursuant to government regulations. The trial court submitted the case on the theory that plaintiff must prove that the Agar or Union Yards were infected, or that they were so used that the government was justified in placing the cattle in quarantine; that defendant unloaded the cattle in these yards; that at said time defendant knew, or in the exercise of reasonable care should have known, that the yards were infected; and that plaintiff was damaged on account thereof.

Defendant assigns 25 errors upon which it relies for a reversal. First it is contended that there should have been a verdict for the defendant for the reason that there is no testimony showing that it had any knowledge that the yards where it placed the cattle were infected, or that there was any danger of the cattle acquiring the disease. The trial court, in its instructions, held the defendant only to the exercise of ordinary and reasonable care in selecting a place for the keeping of the cattle after their arrival in Des Moines, and also said that defendant must have known, or by the exercise of reasonable care should have known, that the Agar Yards were infected when it unloaded the cattle thereat; else it would not be liable. This is the law of the case, and we have to determine whether or not there was enough testimony to take the case to the jury on these propositions. When plaintiff first rested its case, there was not, in our judgment, enough evidence on these propositions to justify a submission to the jury. But, after a motion for a directed verdict in defendant's favor had been overruled, plaintiff was permitted to introduce additional testimony over defendant's objections.

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or children of the person injured. Section 4028 provides that, if deceased had commenced an action before his death, it shall proceed without a revivor, and the damages shall go to the widow and next of kin. Section 4029 defines the damages which may be recovered in such actions. Held, that the statutes do not create a new right of action, but merely preserve the right of action for the widow, children, and next of kin, with the same rights which the injured person would have had, including the right to dismiss a suit brought by the person injured before his death, and bring a new action within the year after a judgment not concluding the merits, allowed by Shannon's Code, § 4446, notwithstanding the lapse of the limitation period since the happening of the injuries.

Same—Same—Same.—A judgment abating the suit because of the death of plaintiff does not conclude the merits.

Fellow Servants—Foreman of Water Supply Division and Engineer.*—A foreman of the water supply of a division of a railroad, whose duties relate to the physical condition of the water tanks located along the line, is not a fellow servant with an engineer of a detached engine, upon which he is riding in the performance of his duties, but with the operation of which he has nothing to do, and does not assume the risk of the negligence of such engineer.

Excessive Verdict.—In an action for injuries resulting in death, it appeared that plaintiff's decedent was, when injured, 56 years of age, sober and industrious, with steady employment, and earning \$75 per month. He suffered great physical and mental pain from his injuries for more than two years previous to his death, and was guilty of no contributory negligence. The damages claimed were \$1,999.99. Held, that plaintiff, on recovering judgment, was entitled to the full amount sued for.

Appeal from Circuit Court, Henry County; John R. Bond, Judge.

Action by Mrs. Lucy C. Stuber against the Louisville & Nashville Railroad Company. From the judgment rendered, both parties appeal. Reversed.

Fitzgerald Williams and J. P. Thomason, for plaintiff.

W. W. Farraborgh, W. W. Lewis, and J. W. Judd, for defendant.

PER CURIAM. This action was brought by Mrs. Lucy C. Stuber, widow of William Stuber, deceased, to recover damages for the death of her husband, caused by the wrongful act of the defendant.

William Stuber, foreman of the water supply of the defendant upon its Memphis Division, while going to Humboldt, September 19, 1898, upon a detached engine of the company, upon which he was authorized to ride, for the purpose of inspecting the water tank at that place, was seriously injured in a collision caused by the negligence of the engineer in charge of the locomotive,

*As to whether trainmen are fellow servants of other employees riding on the train, see foot-notes appended to *Chicago & A. R. Co. v. Wise* (Ill.), 10 R. R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8.

For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to *Indiana, etc., R. Co. v. Otstot* (Ill.), 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149; *Chicago & E. I. Ry. Co. v. White* (Ill.), 13 R. R. R. 558, 36 Am. & Eng. R. Cas., N. S., 558.

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and brought his action against the company May 10, 1899, in the circuit court of Henry county, to recover the damages sustained by him. The case was removed to the Circuit Court of the United States for the Western Division of Tennessee, upon the petition of the defendant, where it was tried, and judgment had in the plaintiff's favor for \$6,000, which was reversed May 7, 1901, upon appeal, by the United States Circuit Court of Appeals for this circuit, and the case remanded to the Circuit Court for a new trial. After this, on March 2, 1902, William Stuber died. His death was suggested and admitted at the April term, 1902, and at the succeeding term, on November 5, 1902, an order was entered abating and dismissing the case.

Mrs. Stuber, his widow, brought this suit February 28, 1903. In her declaration she alleges the negligence of the engineer of the defendant; the injuries sustained by her husband; the institution of his suit in the circuit court of Henry county, and its removal to the federal court; the death of her husband in consequence of the injuries inflicted upon him, and the abatement and dismissal of his suit; stating the facts fully and in proper form. The defendant pleaded in defense the general issue, not guilty, the statute of limitations of one year, and that the judgment of the federal court dismissing the suit of William Stuber was a former adjudication against her right of recovery upon the cause of action sued upon in this case.

The defense made by the last plea is not now insisted upon, and need not be further noticed.

The case was heard by Hon. John R. Bond without the intervention of a jury, and his findings of the fact and conclusions thereon, by request of the parties, were reduced to writing, and appear in the record. His honor was of the opinion that the injuries sustained by William Stuber were caused by the negligence of the engineer of the defendant in charge of the colliding train upon which the deceased was riding, and that these injuries caused his death; that the deceased and the engineer were in the service of the same employer, but in different departments, and were not fellow servants, and so found. But he was of the opinion, and held, that the plaintiff's right of action was barred by the statute of limitations of one year, and dismissed her suit, with costs.

The plaintiff and the defendant both excepted to the action of the trial judge, and bring the case here by appeal in the nature of a writ of error.

The plaintiff assigns as error the action of his honor holding her case barred by the statute of limitations; and the defendant, his finding and holding that William Stuber and the locomotive engineer were not fellow servants.

These are the only questions before us for determination.

We will first dispose of the assignment of error of the plaintiff. From the statement of facts we have made, it appears that William Stuber received his injuries September 19, 1898, and brought

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his action to recover damages therefore May 10, 1899; that he died March 2, 1902, and his suit was abated November 5, 1902; and that this suit was brought February 28, 1903. The first action, then, was brought within one year after it accrued; and this, within one year after that was abated and dismissed.

The contention of the plaintiff is that the cause of action in both cases is the same; that after the death of William Stuber, March 2, 1902, the first suit, under the statute, became her suit, to all intents and purposes, without revivor, and that it was her suit that was subsequently dismissed, and this action having been brought within one year after the dismissal of the first, upon a ground not concluding her right of action, the bar of the statute of limitation is saved by the provisions of Code 1858, § 2755 (Shannon's Code, § 4446).

While the defendant insists that the two actions (that brought by William Stuber and this one) are entirely different suits, having different parties, and beneficiaries, entitled, if successful, to recover different damages, and therefore the statute relied upon by the plaintiff to save the bar of the statute of limitation of one year is not applicable.

We are of opinion that the contention of the plaintiff is sound, and must be sustained. The statutes of Tennessee upon which this action is predicated, and which are controlling in this case, are to be found in sections 4025-4029 of Shannon's Edition of the Code, and are as follows:

"Sec. 4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death has not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

"Sec. 4026. The action may be instituted by the personal representative of the deceased; but, if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, or giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond.

"Sec. 4027. The action may also be instituted by the widow in her own name, or, if there be no widow, by the children.

"Sec. 4028. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property.

"Sec. 4029. Where a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, and provided for, by sections 4025 to 4027, inclusive, the party

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suing shall, if entitled to damages, have a right to recover for the mental and physical suffering, loss of time and necessary expense, resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

These statutes have been frequently construed by this court, and their purpose, meaning, and effect are well settled, and not open for discussion. They do not create a new cause of action in favor of the widow, children, or next of kin of a decedent whose death is caused by the wrongful act of another. They merely alter the rule of the common law under which rights of action of this character, and suits brought thereon, abated upon the death of the injured party, so as to keep alive and preserve the rights of action of the deceased for the benefit of his widow, children, or next of kin, and to authorize suit thereon to be brought to recover the damages sustained, in the name of the personal representative of the deceased, or that of the widow or children, and, where suit has been commenced by the decedent while yet in life, to allow it to be prosecuted to judgment for the same purpose.

In *Whaley v. Catlett*, 103 Tenn. 351, 53 S. W. 133, a case involving the construction of these statutes, this court speaking through Mr. Justice Wilkes, said:

"We are of the opinion that a careful reading of the statutes can lead to no other conclusion than that they provide alone for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in his widow, children, or next of kin. Section 4025, Shannon's Code, refers to it as the right of action which the deceased would have had in case death had not ensued, and provides that it shall not abate or be extinguished, but shall pass to his widow, etc. It does not provide for or refer to any new cause of action arising or coming into existence in their favor. It is alone by virtue of these statutes that a right of action exists in the widow, children, or next of kin, at all, for the unlawful killing of the deceased; and this right exists under the statute, not because it rises directly to them in their own right, but because it passes to them in the right of the deceased.

"At common law all personal actions for wrongs or injuries died with or abated by the death of the party injured, and no right of action survived or arose in favor of the widow or children or next of kin. They can therefore take only under and according to the provisions of the statutes. Citing *Bream v. Brown*, 5 Cold. 170; *Chambers v. Porter*, 5 Cold. 276; *Flatley v. Railroad*, 9 Heisk. 234; *Fowlkes v. Railroad Co.*, 9 Heisk. 831, 846; *Trafford v. The Ex. Co.*, 8 Lea, 97-108; *Railroad Co. v. Lilly*, 90 Tenn. 564, 18 S. W. 243; *Railroad v. Pitt, Adm'r*, 91 Tenn. 86-92, 18 S. W. 118; *Loague v. Railroad Co.*, 91 Tenn. 459-462, 19 S. W. 430; *Railroad v. Bean*, 94 Tenn. 393, 394, 29 S. W. 370."

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It is also held in the case of *Loague v. Railroad Co.*, 91 Tenn. 462, 19 S. W. 430, approved in the case of *Whaley v. Catlett*, *Supra*, that chapter 186, p. 259, Acts 1883 (Shannon's Code, § 4029), allowing the widow, children, or next of kin to recover the damages resulting to them in consequence of the injuries and death of the deceased, in addition to those which he could recover if living, but does not create a new cause of action, but only enlarges the scope of the damages which may be recovered by the parties in suits brought and prosecuted upon the cause of action which accrued to the deceased.

These and other cases brought under these statutes were reviewed and approved in the able and exhaustive opinion of Mr. Justice Neil in the case of *Davidson-Benedict Co. v. Severson*, 109 Tenn. 573, 616, 639, 72 S. W. 967—the latest utterance of this court upon this question.

There is, then, no doubt but that the cause of action is the same in both suits. It is equally as certain that the parties and the beneficiary, in the first suit, when dismissed, and this, are the same.

When William Stuber died, Mrs. Stuber, his widow, had the right, under the statute (Shannon's Code, § 4028), to prosecute the action which he had brought, to judgment without revivor. That suit, upon the death of her husband, by operation of the statute, became and was, in law, her suit, with the power to control it, and to have and receive the benefits that might accrue from it, in as full and ample manner as if it had been instituted by her and in her name after the death of her husband. The statute gave her the right to prosecute it to judgment without revivor, but it did not make it obligatory upon her to do so. The object of the statute was to enlarge and facilitate her remedy upon the cause of action accruing to her husband, not to limit and hamper it. It vested in her all the rights in the suit which her husband had, or which she would have had in an action of this kind originally brought by her. She had the same right which William Stuber had to continue the prosecution of that suit, or to dismiss it and bring another upon the same cause of action. No one would insist that if William Stuber had dismissed the suit, or allowed it to be dismissed by judgment not concluding his right of action, and had brought another within one year, he would be barred by the statute of limitations. If he would not be barred, neither would the plaintiff, who succeeded to all his rights and remedies. The judgment of the federal court dismissing the action then pending, to which she had succeeded, was not a judgment upon the merits, and did not conclude her right of recovery against the defendant, and therefore this case comes clearly within the provisions of the statute (Shannon's Code, § 4446) allowing another suit upon the same cause of action within one year after a judgment of this nature is entered. This court has repeatedly held that judgments abating suits because of death of plaintiffs, upon voluntary nonsuit

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or dismissal, do not conclude the merits, and that a new suit may be brought within one year. *Norment v. Smith*, 1 Humph. 46; *Hooper v. Railroad Co.*, 107 Tenn. 712, 65 S. W. 405; *Railroad Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763.

Coming now to the assignment of error filed by the defendant: The trial judge found that while William Stuber and the engineer whose negligence caused his injuries were in the service of a common employer, the defendant railroad company, they were engaged in different departments of its service, and held that they were not fellow servants, and therefore that the plaintiff did not assume the risks incident to the negligence of the engineer, and that the defendant—other questions out of the way—was liable to his widow or next of kin in damages for the injuries sustained by him. There is no error either in the finding of facts, or the conclusions of law upon them.

The doctrine that the employees of railroad companies, engaged in different departments of the company's service, are not fellow servants, and do not assume the risks incident to the negligence of each other, while not recognized in the courts of the United States, is well established in Tennessee. We will only call attention of a few of our cases in which it was applied.

In the case of *Railroad Company v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816, it is said:

"Ordinarily fellow servants assume the risks incident to each other's negligence, but in Tennessee, where servants of the same master are engaged in different departments of a common service, or one is the superior of another in the same department, either temporarily or permanently, they are not fellow servants, within the meaning of this rule."

And in the case of *Coal Creek Mining Co. v. Davis*, 90 Tenn. 719, 18 S. W. 389, the reasons upon which this exception from the general rule of nonliability of employees to the employers for negligence of their fellow servants is founded are stated in these words:

"The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that, by reason of this division, a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives such servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation."

In the case of *Railroad v. Carroll*, 6 Heisk. 361—the parent case in this state upon this subject—it was held that a section boss was not a fellow servant with the conductor and crew of a passenger train, and could recover from the common employer damages for injuries sustained through the negligence of the crew of trains.

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In *Railroad v. De Armond*, supra, it was held that the conductor of a freight train and a telegraph operator were not fellow servants, and that the former had a right to recover from the common employer damages sustained by reason of the negligence of the latter; the court saying: "It is well settled, whatever may be the rule in other states, that one servant does not assume the risk of the negligence of another servant where the latter is engaged in a different department of work or service. As, for instance, the train crew do not take the risk of the negligence of the track or section hands."

In the case of *Taylor v. Railroad Co.*, 93 Tenn. 306, 27 S. W. 663, it was held that a car inspector was not the fellow servant of an engineer operating a switch engine, but that they were engaged in different and distinct departments of the company's service.

In the case of *Railroad v. Jackson*, 106 Tenn. 445, 61 S. W. 772, it was held that a conductor and a station agent were not fellow servants. It is here said:

"We are of the opinion that the conductor and station agent cannot be considered fellow servants. Their departments are entirely distinct and separate. The duty of one (the conductor) pertains to the physical moving of trains, and in this case, also, the coupling and the uncoupling of cars when necessary. The station agent's duties did not extend to this, but only to the care of the station buildings and grounds, and the transmission to the conductor of such orders as might be sent over the wires for the movement of trains. While, in a certain sense, both were concerned in the moving of trains, the duty of one was confined to the physical exertion and personal oversight necessary to move the train, while the other's duties pertained alone to the transmission of any orders or directions that may have been intended for the guidance of the conductor; but the agent was not to execute such orders, or aid in executing them. But in transmitting these orders he was really acting as telegraph operator, and this court has held that such operator is not a fellow servant with the conductor."

The case of *Freeman v. Railroad Co.*, 107 Tenn. 346, 64 S. W. 1, is very much in point. The plaintiff, a member of a bridge crew whose duty it was to go up and down the road (of course, upon the trains of the railroad company) and repair bridges and trestles, was injured through the negligence of the conductor and engineer operating a train of the defendant; and it was held that the doctrine of fellow servant did not apply, and that he could recover from the railroad company. This court said:

"We think the deceased was not a fellow servant with the conductor and engineer of the train. They were in separate and independent departments. They had no connection with each other in their work and duties. *Railroad Co. v. Carroll*, 6 Heisk. 347; *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816. It has been held that a car inspector is not a fellow

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servant with the crew of a switch engine in the same yard, although it was his duty to inspect the cars pulled around and about by the engine, and have cars placed for repairs. *Taylor v. Railroad Co.*, 93 Tenn. 307, 27 S. W. 663. The bridge crew had nothing to do with the operation of the trains. The trainmen had nothing to do with the bridge crew. Their duties and labors were entirely distinct and separate."

This case is almost identical in its facts with the one under consideration. William Stuber was in no way connected with the operation of the trains of the defendant company. He was not associated with the numerous engineers in control of their locomotives, and had no opportunities of judging of their skill, care, and caution, and it is not to be presumed that he assumed the risk of their negligence or incompetency. His duties as foreman of the water supply of that division of the company's road related to the physical condition of its water tanks located along its line, and, in order to inspect and direct repairs upon them, it was necessary for him to travel upon its trains, and he was authorized to do so upon them all—whether passenger, freight, or detached engines—but he had nothing to do with the operation of the trains and engines. The duties of his department did not require him to have any knowledge of the conduct of trains, or the qualification, skill, and care required in their proper and safe operation. It is clear, we think, that he was employed in a different department from that of the engineer, and, under the well-settled rule of this state, he did not assume the risk of the negligence and want of care and skill of the engineer whose wrongful act caused his death, and that the defendant is liable for the damages sustained by him.

The result is that the judgment of the judge of the circuit court is reversed, and, proceeding to assess the damages which plaintiff is entitled to recover, we find that William Stuber, when injured, was 56 years of age, sober and industrious, with steady employment, and earning \$75 per month; that he suffered great physical and mental pain from his injuries for more than two years previous to his death, and was not guilty of any contributory negligence. These facts entitle the plaintiff to recover the full amount sued for, \$1,999.99, and a judgment for the same will be entered.

LOUISVILLE & N. R. Co. *et al.* v. MARTIN.

(Supreme Court of Tennessee, Feb. 22, 1905.)

[87 S. W. Rep. 418.]

Death of Flagman—Contributory Negligence—Mitigation of Damages—Instruction.—In an action for the death of a railroad-crossing flagman by being struck by a train while on the track, an instruction that the jury "may," instead of "must," consider deceased's contributory negligence in mitigation of damages, was affirmative error.

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Harmless Error.—Where, in an action for death of a flagman by being struck by a railroad train while walking on the track at night, there was evidence that the track was used as a passway, and had been so used by deceased for 14 years, and that it was the safest place to walk, and plaintiff remitted \$3,000 from a verdict of \$10,000, defendant was not prejudiced by an instruction authorizing, but not requiring, the jury to consider decedent's contributory negligence in mitigation of damages.

Negligence—Limiting Speed of Trains—Application of Ordinance—Death of Flagman.*—A city ordinance limiting the rate of speed of railroad trains within the city limits to six miles per hour, and declaring a violation of the ordinance to be negligence per se, if it be the proximate cause of an accident, was for the protection of a railroad-crossing flagman, as well as the public, and applicable to an action for his death, while walking on the track, by being struck by a train.

Fellow Servants—Flagman Employed at Intersection of Railroad—Traffic Arrangement between Companies.—Where a flagman at a railroad crossing occupied by several railroads was employed and paid by one of them, and was not advised of a traffic arrangement between his employer and the other roads by which they paid a portion of his wages, and he was directed by his employer to flag for all of such railroads, he was not a fellow servant of the employees of one of such participating railroads.

Same—Flagman and Trainmen—Different Departments.†—A railroad-crossing flagman is not a fellow servant of the operatives of a train transferring cars along the railroad's main track outside of its switching yards, being in a different department of service.

Death of Flagman—Negligence—Failure to Take Statutory Precautions.—In an action for the killing of a railroad-crossing flagman while walking on the railroad's main track, outside its switching yards, in a city, it was error for the court to refuse to charge that the railroad's failure to take the statutory precautions in running the train constituted negligence.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by Jennie Martin, administratrix of Thomas Gillooley, deceased, against the Louisville & Nashville Railroad Company and others. From a judgment for plaintiff, defendant above named appeals. Affirmed.

Jno. P. Houston and T. B. Turley, for appellant.

J. B. & C. W. Heiskell and T. F. Kelly, for appellee.

MCALISTER, J. Jennie Martin, as administratrix of Thomas Gillooley, deceased, recovered a verdict and judgment against the Louisville & Nashville Railroad Company for the sum of \$10,000 as damages for the negligent killing of her intestate. Pending the motion by the company for a new trial, the court

*See foot-note appended to *Smith v. Atlanta & C. Air Line R. Co. (N. Car.)*, 9 R. R. R. 218, 32 Am. & Eng. R. Cas., N. S., 218; foot-notes appended to *Chicago & A. R. Co. v. Vipond (Ill.)*, 14 R. R. R. 295, 37 Am. & Eng. R. Cas., N. S., 295.

†For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to *Indiana, etc., R. Co. v. Otstot (Ill.)*, 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149; *Chicago & E. I. Ry. Co. v. White (Ill.)*, 13 R. R. R. 558, 36 Am. & Eng. R. Cas., N. S., 558.

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suggested a remittitur of \$3,000, which was accepted by the plaintiff, and a judgment was thereupon entered in her favor for \$7,000.

The company appealed, and has assigned errors.

Plaintiff's intestate, Thomas Gillooley, was a flagman at the crossing of Dean avenue and Broadway, in the city of Memphis, and had been engaged in that occupation for about 15 years. He also flagged at Poston avenue, on the south side of Broadway, 83 feet east of where Dean avenue enters Broadway.

Broadway is practically monopolized by the railroad companies in the construction of their tracks. There is no roadway for vehicles passing longitudinally on Broadway. The tracks of the different railroads extend its entire length, and are about 12 feet from center to center. The Frisco System has two tracks; the Southern, two; the Nashville, Chattanooga & St. Louis and the Louisville & Nashville jointly have one track; and the Union Railway has two.

It appears from the record that on the evening of November 24, 1902, the mangled body of Thomas Gillooley was found a few feet east of Dean avenue, on the track of the Nashville, Chattanooga & St. Louis Railway, which track was also used by the engine and trains of the Louisville & Nashville Railroad Company. The Louisville & Nashville Railroad Company receives freight from certain railroad companies in South Memphis by way of Broadway, and also delivers freight to various industries along Broadway and other points. For this purpose the company has switching crews, whose duties are to handle this freight and to switch cars at the North Memphis Station when not engaged in South Memphis work. The deceased was killed by an engine drawing eight or nine box cars which had been collected along Broadway, and were being carried to some of the switching points of the company. The engine at the time was moving backward; that is to say, the tender on the engine was in front as it moved eastward, drawing the box cars.

It is claimed by plaintiff below that it was not a switch engine, nor engaged in switching, but was a regular road engine, engaged in transferring cars from defendant's road south to its north and intermediate stations. It was backing on the Nashville, Chattanooga & St. Louis main track at the rate of from 10 to 30 miles an hour, as the speed was variously estimated by witnesses for plaintiff. There was also evidence adduced by the plaintiff tending to show that the bell was not rung, nor was there a lookout or headlight on the train. It is conceded on behalf of the defendant company that there was no one on the tender, then in front, on the lookout ahead.

Gillooley, it appears, was employed as a flagman by the several railroads in obedience to the requirements of a municipal ordinance. He was employed by the Frisco System, and was a flagman at Dean avenue and Broadway when the Louisville & Nashville began to operate its trains on Broadway. The record

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discloses that the flagmen were paid by the Frisco System, and the other companies prorated the salaries. The Frisco System paid two-fifths; the Southern, two-fifths; and the Nashville, Chattanooga & St. Louis, one-fifth—of said salaries, which amounts were regulated by the number of tracks each company had on Broadway. The Louisville & Nashville Railroad Company paid its pro rata of Gillooley's salary to the Nashville, Chattanooga & St. Louis Railway. But notwithstanding this traffic arrangement between the several railroads, the fact is established that Gillooley was employed by the Frisco System, and that he received his orders from that system, which alone controlled and directed his actions. He was on the pay roll of the Frisco System, and his salary was paid to him direct by that system; and, according to the testimony, the other railroads had no power to discharge or direct him in his movements. It is true, the deceased flagged for the Nashville, Chattanooga & St. Louis Railway, the Louisville & Nashville Railway, and the Southern Railway, as well as for the Frisco System, but he was directed to do so by the Frisco System. It appears that, under an agreement between the superintendents of the different companies operating trains on Broadway, it was stipulated that the Frisco System should employ the flagmen needed by the different companies, and Gillooley was employed under this agreement.

Plaintiff's evidence tends to show that Gillooley was killed about 5:30 o'clock in the afternoon. It was getting dark, and drizzling rain. According to the testimony, Gillooley had walked east on the Nashville, Chattanooga & St. Louis track (also occupied by the Louisville & Nashville Railroad), and was killed on that track while flagging, or just after he had flagged, to warn persons at Poston avenue, of an approaching Southern train. There was also evidence tending to show that deceased tried to get off the track when he saw the train approaching him from the rear, but it was in such close proximity to him that he had no chance to escape. It appears there was some water between that track and the parallel track just south of it, and there is some evidence that deceased hesitated to leave the track on account of being compelled to get in the water. An ordinance of the city adduced in evidence forbids the running of engines and trains within the corporate limits of the city at a rate of speed exceeding six miles an hour. It is established by the evidence that the accident did not happen within the yard limits of the Louisville & Nashville Railroad. The place of the accident was 12 miles from the company's north station, and about three-quarters of a mile from its south station. As shown, these stations are about 13 miles apart, and, in order to pass from one to the other, the defendant company uses part of the main track of the Nashville & Chattanooga Railway. As already stated, at the time of the accident this train was delivering cars and freight to the industries along Broadway from the north to the south station. There is evidence tending to show that no other train

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passed over Broadway at the point where the accident occurred between the hours of 5 and 6 p. m. on November 24, 1902, excepting this Louisville & Nashville No. 340 train. As stated before, evidence was adduced on behalf of the plaintiff tending to show that no bell was rung or whistle blown. Witnesses testify that, if there was any light at all on the tender of the moving train, it was only a dim light from a lantern. The evidence also shows that the duties of the deceased were to admonish people on Dean and Poston avenues of the approach of trains, but not to stop the trains, since that was the duty of the switchman. The evidence also shows that Gillooley was a careful, sober man, and attentive to his duties. It is stated that during his service of 14 years as flagman he had not lost exceeding 10 days. It is insisted that it was not negligence for deceased to walk on the Nashville, Chattanooga & St. Louis track in going from Dean to Poston avenue for the purpose of flagging, but that it was really the safest place he could have walked. The evidence shows there was a sharp declivity on the north side of this track, and south of it was a depression that held water, and there are also many other parallel tracks. There is also evidence to show that the Nashville, Chattanooga & St. Louis track was the usual place where people walked, and where deceased had been accustomed to walk in the performance of his duties. It appears there was no sidewalk or walkway north of the Nashville, Chattanooga & St. Louis track. The first of the two Southern tracks lies next to the Nashville & Chattanooga track, and between those two tracks, from Dean to Poston avenues, the ground is lower than the tracks; causing a depression in which water accumulates to the depth of four inches.

The contentions of fact made on behalf of the plaintiff in the court below are thus summarized by learned counsel, viz.:

(1) That at the time of the accident the defendant company was not engaged in switching operations within the limits of its yard, but was running a road engine outside of its yard, within the corporate limits of the city of Memphis, at a rate of speed exceeding six miles an hour, which was in violation of the prohibition of the city ordinance.

(2) That it was running this train backwards in a populous part of the city, and had thus disabled itself from complying with the requirements of the state law requiring it to have the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead.

(3) The alarm whistle was not sounded, the brakes put down, and every means employed to stop the train and prevent the accident, although deceased was on the track ahead of the engine, and his perilous position was imminent.

(4) It is further insisted, independent of the requirements of the statute, these duties were all enjoined upon the defendant company at common law, and it is liable for a breach of such duties, whether they be called statutory or common law.

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(5) That at the time of the accident deceased occupied no contractual relations with defendant company as its servant, and hence there was no assumption on the part of Gillooley of the danger and risks incident to the operation of its engines and trains by defendant company.

It is obvious from this statement of the case that there is ample evidence to support the verdict of the jury upon one or more theories of defendant's liability. Moreover, it appears there is no assignment of error on behalf of the defendant company that there is no evidence to support the verdict and judgment of the court below.

The first assignment of error is based upon the charge of the court in stating to the jury that:

"The negligence of the deceased may be considered by the jury in mitigation of damages."

The objection to the charge is that contributory negligence, as a matter of law, must go in mitigation of damages, and the jury is not left to the exercise of any discretion in saying whether it may or may not be so considered.

It is therefore insisted the charge of the court on this subject contains affirmative error, which was prejudicial to the rights of defendant below.

In reply to this assignment of error, counsel for defendant in error insists that the rule on this subject has not been uniform and invariable, as will be seen from the decisions of this court, but that the terms "may" and "must," in dealing with the subject of contributory negligence in mitigation of damages, have been used indifferently. In support of this contention, counsel cite authorities in which the following phrases are used:

"Might be looked to." *N. & C. R. Co. v. Smith*, 6 Heisk. 178, 179; *L. & N. R. Co. v. Robertson*, 9 Heisk. 282.

"Proper to be considered." *R. R. v. Fain*, 12 Lea, 38.

"Should be considered." *Dush v. Fitzhugh*, 2 Lea, 308, 309; *R. R. v. Humphreys*, 12 Lea, 208; *R. R. Co. v. Flemming*, 14 Lea, 128.

"'May' and 'should' mitigate." *R. R. v. Walker*, 11 Heisk. 386.

"May be considered." *L. & N. R. R. v. Conner*, 2 Baxt. 388; *L. & N. R. R. v. Burke*, 6 Cold. 52; *Turnpike v. Yates*, 108 Tenn. 437, 67 S. W. 69; *R. R. v. Wallace*, 90 Tenn. 62, 15 S. W. 921; *Hill v. L. & N. R. R.*, 9 Heisk. 826.

"Only mitigates damages." *Railway Companies v. Foster*, 88 Tenn. 678, 13 S. W. 694, 14 S. W. 428.

An examination of the cases in which these expressions are used will show that the court's attention was not challenged to their accuracy. Such inaccurate expressions frequently occur and pass unnoticed in instructions to juries and in the opinions of this court. They are not, however, to be exalted to the standard of judicial precedents when it is very clear that no determination of the subject was intended. It is to be observed, how-

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ever, that our decisions show that, wherever the question has been raised, it has been uniformly adjudged by this court that a charge leaving this question to the discretion of the jury is erroneous. The question first arose in *N. & C. R. Co. v. Nowlin*, 1 Lea, 523. The charge of the trial judge in that case, which was the subject of review, was substantially the same as the charge given in the present case. In that case the trial judge had instructed the jury as follows:

"The negligence of the person in all cases can be looked to in mitigation of the damages or the amount of recovery."

This court said in respect of that charge as follows:

"Although the railroad may be and is liable because of a failure to comply with the statutes, yet the contributory negligence of the party suing will go in reduction of damages. And this we hold to be a fixed rule of law—one of substantial right—and which the railroad has the right to have applied if the jury should find contributory negligence upon the part of the party suing."

This court further said that:

"If the jury found that the plaintiff was guilty of contributory negligence at the time of the accident, then it was their duty to look to it in assessing his damages, and augment or diminish the same according as they found his negligence to be slight or gross."

For error in the charge of the trial judge, the judgment in that case was reversed and the cause remanded. *Postal Telegraph Cable Co. v. Zopfi*, 93 Tenn. 373, 24 S. W. 633.

In *Patton, Adm., v. Railway Co.*, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184, this court said as follows:

"The fact that deceased went on the track without looking or listening, and that he continued upon it unconscious of danger until overtaken and run down, is negligence that cannot be overlooked, and for this negligence he cannot be entirely exonerated; and this must be allowed in mitigation of damages, even if the jury shall think that his negligence, under the peculiar facts of this case, was not the more immediate cause of the accident."

In *Byrne v. K. C., F. S. & G. R. R.*, 61 Fed. 605, 9 C. C. A. 679, 24 L. R. A. 693—a case which arose in Tennessee—Judge Lurton, in commenting on this subject, said as follows:

"The Supreme Court of Tennessee has been very stringent in requiring that trial judges should instruct juries, in cases under this statute, that they must reduce damages for contributory negligence. * * *

"The court should also say to the jury that they must, if they find that the bell was not ringing, reduce the damages to be awarded to the plaintiff by reason of the intestate's gross negligence," etc.

The wisdom and soundness of this rule must be apparent on a moment's reflection, for if, as a matter of law, it is not the duty of the jury, in the assessment of damages, to mitigate the re-

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covery in proportion to the contribution of the plaintiff to the injuries, cases would occur where gross injustice would be inflicted upon defendants, in the exercise of the jury's discretion, in ignoring altogether the contributory negligence of the plaintiff.

But as we have seen, in *L. & N. R. R. v. Satterwhite*, Adm. (Tenn.) 79 S. W. 106, this court held erroneous a charge of the trial judge on the subject of exemplary damages which used the word "should" instead of "may."

We are therefore of opinion that the charge of the trial judge in the present case on the subject of contributory negligence is affirmatively erroneous.

The contributory negligence of the deceased relied on by the company consisted in the proof that he was walking at the time of the accident on the track of the Louisville & Nashville Railroad Company without looking or listening or exercising proper care for his own protection. In reply to this position, counsel for defendant in error say that Gillooley walked on the Louisville & Nashville track, where others walked, and where it was safest to walk, and where he had walked for 14 years past. It is insisted that under the proof Gillooley could not, with safety, on that dark night, have gone on the north side of the Nashville, Chattanooga & St. Louis track, for there was a precipitous descent from the track to the depth of four feet. It is said further that the proof shows that Gillooley could not have walked on the south side of that track, because the ground between it and the Southern track was depressed, and there was an accumulation of water there to the depth of four inches.

These considerations extenuate, in a large degree, the facts and circumstances relied on by the company to show contributory negligence on the part of deceased; and, in view of the remittitur of \$3,000 entered upon the verdict at the suggestion of the court, we think the company has received the full benefit of a correct charge on the duty of the jury to mitigate the damages on account of the contributory negligence of deceased.

The third assignment of error is as follows:

"The court erred in charging that the city ordinance as to speed was applicable to this case, and also in the manner in which it was given to the jury, and in not properly qualifying and correcting it. The court said: 'The court therefore instructs you that there is an ordinance prohibiting, under a penalty, any railroad company or person to run any engine or train of cars on any railroad running into the city, on which cars are propelled by steam, at a greater rate of speed than six miles an hour, within the limits of the city. A violation of this ordinance is negligence per se, if it be the proximate cause of an accident.'"

It is insisted it was error to give the ordinance in charge to the jury, because Gillooley was an employee, and the ordinance was intended for the general public, and not an employee, and especially was it not intended for an employee whose duty it was to watch for the very train which it was claimed killed him.

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It is conceded in the argument that, when a statute of a state or an ordinance of a municipality is passed for the benefit of a person or class of persons, a violation of such statute or ordinance which results in an injury to any of such persons will give a right of action to recover for his injuries; but the contention is that this ordinance was passed for the benefit of the general public, and that deceased, who was employed for the purpose of observing the approach of trains and admonishing the public thereof, was not comprehended within the scope of this statute. It is said that, if this ordinance was made to protect a flagman at a crossing, it also protects one put to attend to gates at a crossing; also enginemen, firemen, switchmen, conductors, and trackmen operating trains within the city limits, or keeping the track in order. The argument is that no law or ordinance gives a right of action, except to such persons as are comprehended within its object. The case of *Queen v. Coal Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935.

In that case it appeared there was a state statute which makes it a misdemeanor to employ a minor under the age of 12 years in any factory. But a minor under 12 years of age had been employed in violation of the terms of the statute, and had sustained serious personal injuries during such employment. The court held that the statute imposed a duty on the coal company not to employ such a person, and that a violation of the statute gave a right of action to any minor who had been injured as a proximate consequence of such employment. It is insisted that minors, being a class of persons for whose benefit the statute was passed, were entitled to a right of action.

While this is true, we are unable to perceive why the deceased was not entitled to the protection of the municipal ordinance in question, forbidding the operation of engines within the corporate limits at a speed exceeding six miles an hour. He did not occupy toward the defendant the relation of a servant, but was stationed at the crossing in obedience to a city ordinance, charged with the duty of observing the approach of trains, and in the performance of duties for the benefit of the general public. His duties cannot be assimilated to those of an engineer, fireman, or other trainman.

Moreover, this court held in the case of *Williford v. Memphis Street Railway Co.* (decided at the April term, 1903, MS. opinion) 87 S. W. —, that the violation of this ordinance regulating the rate of speed within the corporate limits of the city of Memphis afforded a right of action to any one injured in consequence thereof, provided such excessive rate of speed was the proximate cause of the accident.

The fourth assignment of error is based upon the charge of the circuit judge on the doctrine of fellow servants. The charge objected to is as follows:

"But as a determination by you of the issue of the fellow servant in favor of one of the parties to this suit would obviate the

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necessity of applying the foregoing rules in the consideration of this case, that issue will be taken up first.

"In this connection, the court instructs you, gentlemen, that a fellow servant in a railroad service may be defined as one who, with the plaintiff or a plaintiff's decedent, is or was engaged in a common employment, under a common master, in the same branch or department in the railroad service.

"The court likewise instructs you that if you find from a preponderance of the evidence that Thomas Gillooley was employed by the St. Louis & San Francisco Railroad Company, commonly called the 'Frisco,' as a flagman at the intersection of Dean avenue and Broadway, and was instructed by his employer to flag trains of the several railroads passing there, including the defendant the Louisville & Nashville Railroad Company; and if you further find from the evidence that an agreement existed between the Frisco and the Nashville, Chattanooga & St. Louis Railway to prorate the pay and accept the services of this and other flagmen on the line, and likewise an agreement between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to also prorate the pay and accept the services of such flagmen as were thus employed by the latter under the above agreement; and if you further find from the evidence that the deceased, Thomas Gillooley, was made aware of and assented to this agreement, and, being so aware and assenting, did flag trains of the defendant the Louisville & Nashville Railroad Company—then, under this finding, the court instructs you that Thomas Gillooley would have been a servant of the defendant the Louisville & Nashville Railroad Company, and likewise a fellow servant of the engineer and fireman of the train to be so flagged."

The criticism upon this charge is that the trial judge made the question in respect of the relation of Gillooley to the defendant company depend upon his knowledge of the arrangement between the employing companies and his assent to the same. It is insisted the question should be made to turn upon the duties to be performed. It is said the contract of employment was made by one road for the benefit of all, and the salary was prorated. The important feature of his employment, according to the contention of the company, is that it was as much the duty of Gillooley to flag for the Louisville & Nashville Railroad as it was to flag for the other companies, and that such was his invariable custom.

We are unable to give our assent to this proposition. There must be some privity of contract between the parties in order to warrant the application of the fellow-servant doctrine.

In 2 Thompson on Negligence (1st Ed.) p. 1043, it is laid down:

"But there is no sound reason on which the servants of one master can be treated as fellow servants with the servants of another master. The rule which exempts the master from lia-

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bility for an injury inflicted by one of his servants upon another is based upon an implied contract between a servant and his master that the former will accept all the natural and ordinary risks incident to the business in which he is engaged, which include the negligence of those whom the master may associate with him. In this view of the reason of the rule, it is a rule based upon a privity of contract. This being so, it obviously does not apply between the persons between whom there is no privity of contract. A., when he entered into the service of B., impliedly says to B.: 'You have selected fit and competent servants to work with me. I assume the risks of injuries from their negligence.' But he does not say: 'I assume the risks of injuries from the negligence of the servants of C., D., or E., in connection with whom I may be obliged to work.'" *Zeigler v. Danbury, etc., R. Co.*, 52 Conn. 543, 2 Atl. 462; *Delaware R. R. v. Hardy* (N. J. Sup.) 34 Atl. 987; *R. Co. v. Ferch* (Tex. Civ. App.) 44 S. W. 317; *Swanson v. Northeastern R. R.*, 3 Exchequer Div. (The Law Reports) 341.

The proof shows that Gillooley was not advised of the traffic arrangement between these roads, and was not aware of its terms, nor did he assent thereto. It is manifest that his services could not have been transferred to the defendant company, and the relation of master and servant thereby, created without his consent.

But if it be conceded deceased was at the time of the accident the servant of defendant, we think it quite clear he was not the fellow servant of the crew that killed him, for a reason he was in a different department of the service. As already shown, he had been placed at Dean avenue by the Frisco System, in compliance with the city ordinance, to admonish persons of the approach of trains.

We think the facts presented on this record make out a case of absolute liability on the part of the company. The crew in charge of the train causing the accident were not engaged in switching within the company's yard, but were employed outside of the yard, transferring cars from its north to its south station.

The Clarkson Case decided by this court, and reported in 28 Am. & Eng. Ry. Cas. 459, is not applicable to the facts of this case. It was held by this court in the Clarkson Case, viz.:

"If the accident occurs in switching operations proper and necessary in and about the depot grounds and yards, and whether on or off a street, the company is not required to observe the statutory precautions, though it is required to observe the care and caution which the dangerous conditions demand."

But here the train was not on the switching track, but on the main track. The defendant's switching yards extended 300 yards east of Main street, while the accident occurred three quarters of a mile east of Main street. The trial judge was of opinion the statutory precautions did not apply to the facts of this case, and his charge was rested alone upon the common-law duty enjoined on the company.

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In failing to charge the statute, we think the court committed error, but it has not resulted in prejudicing the rights of plaintiff. In *Railroad v. Dies*, 98 Tenn. 655, 41 S. W. 860, this court said, viz.:

"The liability of a railroad is absolute for killing a person upon its track by a backing engine and tender which are not engaged in switching within the company's yards. The statutory precautions apply in such a case, and the manner of running the engine precludes the possibility of observance."

This rule had previously been announced by this court in *Railway Co. v. Wilson*, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693. In the latter case the judgment against the railroad in the court below had been rested on a breach of its common-law duty, and, while this court was of opinion the reason given for the judgment was erroneous, the judgment was affirmed, because it already appeared there had been a breach by the company of its statutory duty.

For the reasons indicated, the judgment is affirmed.

DONALDSON v. NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, June 22, 1905.)

[74 N. E. Rep. 915.]

Witnesses—Impeaching Evidence.—Under Rev. Laws, c. 175, § 24, providing that the party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony, such inconsistent statements merely discredit the witness, and do not have the effect of independent evidence.

Death of Brakeman—Cause of Accident—Exercise of Care by Deceased—Sufficiency of Evidence.*—In an action for death of a brakeman in defendant's employ, evidence merely that, as the train came in, some one was seen standing where he usually stood on the front platform of the forward car; that after the train stopped he was found between such car and the tender, with his head crushed, and that after the train stopped it came back a little, taking up the slack; and that he had given no warning to the engineer or conductor that he was going between the cars to make an uncoupling, as was his duty when he did go between them for such purpose—is insufficient to authorize an inference of the cause of the accident, or that deceased was in the exercise of due care.

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Action by one Donaldson against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

*As to the presumption of due care on the part of a person killed by a car, see foot-notes appended to *Texas & P. Ry. Co. v. Shoemaker* (Tex.), 14 R. R. R. 594, 37 Am. & Eng. R. Cas., N. S., 594.

Donaldson v. New York, etc., R. Co

I. R. Clark and G. F. Ordway, for plaintiff.

Choate, Hall & Stewart, for defendant.

LATHROP, J. This is an action of tort brought by the widow of Joseph Donaldson under St. 1887, p. 900, c. 270, § 2, to recover for the death of her husband while in the employ of the defendant as a brakeman. At the close of the plaintiff's evidence the judge before whom the case was tried in the superior court directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The train upon which Donaldson was working ran between Marlboro and Mansfield. The train had two engines, and Donaldson's position when the train was in motion was on the front platform of the forward car. There was evidence that, as the train was coming into the station at South Framingham, a man in the uniform of a railroad employee was seen standing where Donaldson usually stood. After the train stopped, one of the brakemen, named Hayes, started with his lantern to look under the cars to see that everything was right. He found Donaldson between the forward car and the tender of the engine, lying on the ground between the tracks, and it was discovered afterwards that his head was crushed. He was breathing, but was unconscious, and died soon afterwards. Hayes notified the conductor and the fireman of the engine next to the train that a man had been hurt, and not to move the engine. The fireman gave the same warning to the engineer of the forward engine. Donaldson was an experienced railroadman, having spent most of his life upon the Central Vermont Railroad as brakeman and conductor, and later had come to the defendant road. He had been running on the train in question for two or three weeks. There was evidence that it was Donaldson's duty to do the switching, coupling, and uncoupling of the engine and cars, and to attach the steam hose which came from the engine. There was also evidence that after the train had stopped it came back a little; taking up the slack, as it was called. It also appeared in evidence that the rear cars were not sufficiently warmed, but there was no evidence that Donaldson knew this. The evidence was uniform that, after the cars stopped, nothing was done to uncouple the engines or the steam hose until after the accident.

The theory of the plaintiff is that Donaldson went between the tender and the forward car in the discharge of his duty. But there is no evidence of this. On the contrary, there was a rule of the road, put in evidence by the plaintiff, which read as follows: "Never go between the cars for the purpose of coupling or uncoupling, or to make any adjustments, without first notifying the enginemen and properly protecting yourself." There was also evidence from the conductor of the train as follows: "It was a part of the brakeman's duty to let the conductor or engineer know if he went between the cars. Witness had warned Donaldson more than once." There was no evidence that Donaldson gave any warning that he was going between the cars.

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If, therefore, he went there voluntarily, he was not in the discharge of his duty, and was guilty of negligence.

An ingenious attempt has been made by the plaintiff to show by the testimony of some of the witnesses given at an inquest held soon after the accident that their testimony there was not in all respects in accordance with their testimony at the trial, and an attempt has been made to argue the case on the testimony at the trial as corrected by the evidence at the inquest. The evidence at the inquest was admitted under Rev. Laws, c. 175, § 24, which reads: "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony." The statute allows a party to contradict his own witness, but, in the language of Mr. Justice Endicott in *Brooks v. Weeks*, 121 Mass. 433, "the contradiction can have no legal tendency to establish the truth of the subject-matter of the statements." See, also, *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61. In other words, such evidence, though it discredits the witness, does not have the effect of independent evidence. *Manning v. Carberry*, 172 Mass. 432, 52 N. E. 521.

Upon the evidence put in by the plaintiff there is nothing, in our judgment, from which a jury could fairly infer the cause of the accident, or that Donaldson was in the exercise of due care. It was purely a matter of conjecture. *Corcoran v. Boston & Albany Railroad*, 133 Mass. 507; *Riley v. Connecticut River Railroad*, 135 Mass. 292; *Shea v. Boston & Maine Railroad*, 154 Mass. 31, 27 N. E. 672; *Tyndale v. Old Colony Railroad*, 156 Mass. 503, 31 N. E. 655; *Irwin v. Alley*, 158 Mass. 249, 33 N. E. 517; *Chandler v. New York, New Haven & Hartford Railroad*, 159 Mass. 589, 35 N. E. 89; *Geyette v. Fitchburg Railroad*, 162 Mass. 549, 39 N. E. 188; *Murphy v. Boston & Albany Railroad*, 167 Mass. 64, 44 N. E. 1087; *Dacey v. New York, New Haven & Hartford Railroad*, 168 Mass. 479, 47 N. E. 418; *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497, 65 N. E. 823.

Exceptions overruled.

CROSBY *v.* LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit, April 27, 1905.)

[137 Fed. Rep. 765.]

Master and Servant—Injuries to Servants—Railroads—Fellow Servants.*—A fireman on a railroad passenger engine is a fellow servant with the conductor of a passenger train approaching from the opposite direction, for whose negligence, resulting in the fireman's death in a head-on collision, the railroad company was not liable.

*See foot-notes appended to *Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233.

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Same—Employer's Liability Act—Persons Engaged in Superintendence.—Laws N. Y. 1902, p. 1749, c. 600, provides that an employee, his executor or administrator, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work, where personal injury is caused to the employee by reason of the negligence of any person in the employer's service intrusted with or exercising superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority and consent of the employer. Held, that where the rules of a railroad company provided that a train must be governed strictly by the terms of orders addressed to it which, once in effect, so continued until fulfilled, superseded, or annulled, and a railroad conductor received and violated an order from his train dispatcher, which violation resulted in a collision in which the fireman of the opposite train was killed, such conductor was not then "acting as superintendent in the absence of the railroad company's superintendent," within the statute, so as to render the latter liable for the fireman's death.

In Error to the Circuit Court of the United States for the Western District of New York.

See 123 Fed. 193.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Western District of New York, upon a verdict directed in favor of defendant in error, who was defendant below. The action was brought to recover damages for the death of Peter W. Putnam, fireman on a passenger train of the defendant, who was killed in a head-on collision with another passenger train near Rochester, N. Y.

Frank Gebbans, for plaintiff in error.

James McMitchell, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. There is no conflict of evidence, the facts in the case having been stipulated. The complaint alleged that the accident was caused solely by the negligence of one De Lavergne, conductor of the train with which Putnam's train collided, who, "as such conductor, and in the absence of the superintendent of said railroad line, was acting as superintendent, with the authority and consent of the defendant, of a certain train of cars"; and that he was negligent "while acting as such superintendent."

The railroad of defendant from Rochester to Honeoye Falls was operated as a single-track road, having at the Rochester terminus, and at certain other points on the road, switches and sidings to permit trains to pass each other in safety. The movement of trains was in general regulated by the time-table, but, when occasion required a departure from the time-table, the character and extent of such departure was regulated by telegraphic orders. Such orders for the movement of trains on the division where the accident happened were issued by the train dispatcher from the transmitter's office at the city of Buffalo under the authority of the superintendent of that division, whose

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office was located at Buffalo. On the day in question De Lavergne was conductor, and Connelly engineman, of passenger train No. 656, scheduled on the time-table to leave the station at Rochester (east-bound) at 6:30 p. m. Another passenger train, No. 665, was scheduled on the time-table to leave Honeoye Falls for Rochester at 5:53 p. m. At 6 p. m. the train dispatcher issued a "31" telegraphic train order from his office in Buffalo, which directed No. 665 to proceed to Rochester station without stopping upon the side track to allow train 656 to pass it, and directed the latter train to remain at Rochester station, and not depart therefrom until after the arrival thereat of train No. 665. This order was duly transmitted to Rochester, and copies duly delivered both to the conductor and engineman of train 656 at 6:19 p. m. By the rules a train "must be governed strictly by the terms of orders addressed to it and must not assume rights not conferred by such orders," which "once in effect continue so until fulfilled, superseded or annulled." The same order was also duly transmitted to another station on said line, known as "Rochester Junction," and there duly delivered to the conductor and engineman of train 665 at 6:14 p. m. Train 656 left Rochester station at 6:30 p. m., prior to the arrival of train 665. Said train was started by conductor De Lavergne giving a hand signal to start to the fireman, who communicated such signal to the engineman, Connelly, who thereupon started his engine. No train order, other than the one heretofore specified, was issued or given to either said conductor or engineman, subsequent to its issuance and delivery to both of them; each of them, at the time the train was started, had in his possession his respective copy of said order, and the action of both in starting the train was an inexcusable violation of the rules, and, concededly, negligence. As a result of such negligence the train collided, about a mile east of Rochester station, with train 665, without any fault on the part of the conductor or engineer of the latter train.

It is manifest from this statement of facts that plaintiff could not recover in the federal courts on general principles of law. The case of *C., M. & St. P. Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, is substantially overruled by *N. E. R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. It had been already shorn of its authority by *N. P. Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Central R. R. of N. J. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; and *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746. The same court (dividing five to four) has gone still further in *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; but even without this last authority it is now settled law in the federal courts that conductor, engineer, and brakemen must be deemed to have been fellow servants. The law is the same in New York. *Wooden v. West N. Y. & P. R. R.*, 147 N. Y. 508, 42 N. E. 199. The

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plaintiff's sole reliance is the employer's liability act of the state of New York (Laws 1902, p. 1749, c. 600). It provides that "the employee [or executor, or administrator] shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of the employer, nor engaged in his work," "where * * * personal injury is caused to an employee * * * by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority and consent of such employer."

The sole question presented here is whether the conductor was a person "entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence"? or, if he was not generally such a superintendent, was he on the particular occasion, "in the absence of such superintendent, acting as superintendent with the authority and consent of the employer"? The New York statute is modeled generally upon the English employer's liability act, but differs from it in one important particular. Besides provisions for the negligence of any person who has any superintendence intrusted to him, the protection of the English act is extended to employees injured by reason of the "negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive-engine or train upon a railway." A similar clause is found in the employer's liability acts in Massachusetts, Alabama, Indiana, and Colorado. Reno's Employer's Liability Acts, Appendix. The New York act contains no such clause. It is stated in defendant's brief that such a clause was in the original bill, but was struck out before passage. However that may be, the failure to include it, although in many other respects the English and Massachusetts acts were used as models, is suggestive; and the decisions in other states as to liability for the negligence of conductors under statutes which include the clause are unpersuasive to a construction of the New York act, so far as it applies to the operation of railroads. The only authority in this state to which our attention has been called bearing upon this branch of the case is *McHugh v. Manhattan Ry. Co.*, 179 N. Y. 378, 72 N. E. 312, where a train dispatcher or yardmaster negligently directed the starting of the train while deceased was in a position of danger. The train dispatcher had charge of the yard and the sidings at stations where trains are made up, the movement of trains therein, and of the yard force employed at those points, and enginemen were directed to obey his orders in regard to shifting and making up trains and starting from terminals. The case was complicated by the circumstance that the train dispatcher, Coleman, had momentarily (as he had a right to do under the rules) turned over his work to his telegraph operator, Flanagan. The court held that, except for the statute, defendant

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would not have been liable for the negligence of either Coleman or Flanagan; and that Flanagan was acting as substitute with defendant's authority or consent. Defendant conceded that Coleman was a superintendent within the terms of the statute, but contended that the particular duty of seeing that the coupling was made and the coupler in safety was not in the nature of superintendence, but merely a detail of the work. Of this contention the court says:

"Doubtless, had the train been started by the engineer without a signal, or had the conductor or one of the guards improperly given a signal for the train to move, it would have been the act of a fellow servant, and the defendant would not have been liable therefor. But it does not follow that the act of a train dispatcher in sending out the train is to be regarded in the same light or as of the same character."

And they held the employer liable. This opinion is not particularly illuminative of the question presented on this appeal, although the above quotation seems to indicate that the court were not inclined to put train dispatchers and conductors in the same category. The cause of the accident in the case at bar was the failure so to regulate the movement of trains on that division as to avoid collision. The person who was intrusted with that superintendence was the train dispatcher at Buffalo. Whatever may have been the power and duties of the conductor relative to running his train—and the rules which were put in evidence show them to be what are ordinarily understood to be such duties—he was, under the circumstances here shown, when the time-table had been suspended by a "31" order, wholly without any discretion or initiative as to starting, without even any power himself to start the train, for the rule required the engine-man with such an order in his pocket to disobey the conductor's signal to start, should the latter undertake to give one. Plaintiff, no doubt appreciating this difficulty, contends that the conductor was a "person acting as superintendent" with the authority and consent of the employer, in the absence of the superintendent. That is the theory of the complaint; see quotation therefrom, *supra*. The argument is:

"Now, if it be assumed that the division superintendent would be the person whose sole or principal duty is that of superintendence, it must be admitted that he was absent at the time of the accident. He gave certain orders which the conductor had to carry out. The superintendent cannot be personally present on each train. He is but one man, and the railroad company has many trains. He must therefore, in his absence, intrust some person with his authority on each train. Under the rules of the company, that person is the conductor."

The rules of the company warrant no such conclusion. The authority of the superintendent empowers him to say when the time-table shall be modified, and when a "31" order stopping a train shall be suspended or annulled. No such authority is

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conferred by the rules on any conductor whose train has been stopped by a "31" order; he must wait, obedient to the order, without initiative or discretion, until the superintendent, or whoever else may be acting as superintendent, shall suspend or annul it. Moreover, we cannot assent to the proposition that the division superintendent was "absent at the time of the accident." Upon the plaintiff's theory that he must be actually within sight of each train, he would always be absent when performing his duties. He sits in his Buffalo office, where he is constantly advised by telegraph of the movements of all trains on his division. Every delay in the advance of a train from point to point, every interference with freedom of movement through some accident, every departure of existing positions of trains at any moment from those which the time-table indicates they should occupy, every derangement of relative movements on the whole or a part of the division due to the introduction of unscheduled trains, is displayed before him, and, as the rules indicate, he is the one to exercise discretion as to the modifications which every varying situation requires in order to insure safety. Moreover, his directions and orders are transmitted by the telegraph to every station or train which it may be necessary to instruct, and, when received, his orders are made controlling upon those to whom the actual operation of the train is confided. His mind is present though his body be absent, and it makes no difference whether his order is handed to them by a telegraph operator at some particular station or by himself. We approve the contention of the defendant that the train dispatcher or division superintendent was legally and constructively present by virtue of his orders, which were duly transmitted and duly delivered to conductor and engineman in charge of the train, inasmuch as, under defendant's rules, the said operatives were under an absolute obligation to carry out these orders.

The judgment is affirmed.

COX *v.* CENTRAL VERMONT R. Co. *et al.* AMBLER *v.* SAME.
 DENNIS *v.* SAME. BURDITT *et al.* *v.* SAME. PRENTISS *v.*
 SAME. WHITING *v.* SAME. EDGERLY *v.* SAME. CROSBY
v. SAME. CHASE *v.* SAME. JOHNSON *v.* SAME. TRAIN *v.*
 SAME.

(Supreme Judicial Court of Massachusetts, Suffolk, April 4, 1905.)

[73 N. E. Rep. 885.]

Garnishment—Liability of Garnishee—Connecting Railroads.*—A railroad which, under an agreement between itself and other railroads forming a connecting line, settles and pays accounts monthly to the road immediately adjoining its own, including therein the amounts due to the railroads whose roads lie beyond, is not liable as trustee in attachment against such adjoining road for a sum so found due to the adjoining road, and for which it is in turn liable to the roads beyond it under the agreement.

Same—Same—Property Held under Lease.*—Where a lease of a railroad made by one corporation to another required the lessee corporation to maintain the leased road, pay its indebtedness, etc., and then divide the balance of its earnings between the parties to the lease, the gross income from the leased road in the hands of the lessee could be used by the lessee as its own money, and it was not acting as trustee in the collection of all earnings and the incurring of all debts contracted by it in operating the road.

Same—Same—Same—Railroad Rolling Stock.—Rev. Laws Vt. 1880, § 3353, makes the cars and engines of a railroad company a part of the real estate which passes under a mortgage when such a conveyance of a railroad is made; and section 3443 gives a right to attach cars, engines, and other property used in the operation of a railroad, on a claim for an injury to person or property. Held, that where a railroad corporation leased a railroad to another corpora-

*For the authorities in this series on the subject of the right to garnishee railroad companies and their agents, see *Chicago & S. E. Ry. Co. v. Witt* (Ind.), 8 R. R. R. 129, 31 Am. & Eng. R. Cas., N. S., 129 (proceedings quasi in rem in the nature of garnishment of agent of railroad company, against which there is an unsatisfied judgment, under Burns Rev. St. 1901, § 834 a); *Burnett & Goodman v. Central of Ga. R. Co.* (Ga.), 7 R. R. R. 495, 30 Am. & Eng. R. Cas., N. S., 495; *Pennsylvania R. Co. v. Rogers* (W. Va.), 7 R. R. R. 413, 30 Am. & Eng. R. Cas., N. S., 413 (status of garnishee and foreign corporations and nonresidents on same footing in respect to garnishment); note, 21 Am. & Eng. R. Cas., N. S., 501 (goods in depot); note, 21 Am. & Eng. R. Cas., N. S., 504 (whether carrier liable for nondelivery of freight seized while in its custody under legal process); note, 19 Am. & Eng. R. Cas., N. S., 206 (garnishment of freight in depot); *Holbrook v. Evansville, etc., R. Co.* (Ga.), 23 Am. & Eng. R. Cas., N. S., 597 (service of summons upon railroad); *Baldwin v. Great Northern Ry. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 202 (effect of garnishment after delivery to carrier); *Santa Fe Pac. R. Co. v. Bossut* (N. Mex.), 19 Am. & Eng. R. Cas., N. S., 683 (garnishee's right of appeal); *Kansas City, etc., R. Co. v. Parker* (Ark.), 22 Am. & Eng. R. Cas., N. S., 441 (right to garnishee foreign railroad corporation on account of wages earned within state); *St. Louis S. W. Ry. Co. v. Gate City Co-Op. Grocery Co.* (Ark.), 23 Am. & Eng. R. Cas., N. S., 875 (right to garnishee one railroad company on judgment against employee of another when they have officers in common).

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tion, the lessor having previously mortgaged the road, and the lease authorized its termination at any time, on short notice, for a breach of covenant, and required the lessee to keep the property in good condition, and to return it or other like property at the termination of the lease, the lessee's interest in the cars of the lessor was not an ownership, within the meaning of the statute authorizing attachment.

Attachment—Railroad Rolling Stock.—Rev. Laws, c. 167, § 39, providing that railroad cars making regular passages on railroads are not attachable on mesne process within 48 hours previous to their fixed time of departure, unless the officer has first demanded of the owners or managers other property in lieu thereof, applies to an attachment of cars and engines by trustee process.

Same—Same.—A car standing on a side track in Vermont can not be reached by trustee process against a railroad issued by a court in Massachusetts, since effect could not be given to the attachment thereof unless the trustee should bring the car into the commonwealth, which he was under no obligation to do.

Report from Superior Court, Suffolk County; Wm. Schofield, Judge.

Actions by Cox, Ambler, Dennis, Burditt and others, Prentiss, Whiting, Edgerly, Crosby, Chase, Johnson, and Train against the Central Vermont Railroad Company; the Boston & Maine Railroad being summoned as trustee, judgment charging the trustee, and case reported for the Supreme Judicial Court. Affirmed.

Robt. M. Morse and Wm. M. Richardson, for plaintiffs.
J. L. Thorndike and E. R. Thayer, for trustee.

KNOWLTON, C. J. The question in these cases is whether the Boston & Maine Railroad, summoned as trustee, shall be charged upon its answers. The cases have been pending many years, and different answers have been filed at different times, and various proceedings have been had to determine the liability of the trustee. On December 1, 1902, an answer was filed in addition to and in amendment of the former answers, which purports to give with much fullness the facts in regard to the various questions now before us. We are of opinion that the previous proceedings do not affect the right of the parties to rely upon this answer, in connection with the other answers, as stating facts upon which the cases should be decided.

Many of the statements are made upon information and belief. These statements, in the absence of anything in the record to control them, must be taken as true. *Willard v. Sturtevant*, 7 Pick. 194-197; *Bostwick v. Bass*, 99 Mass. 469; *Clinton Bank v. Bright*, 126 Mass. 535; *Emery v. Bidwell*, 140 Mass. 271-274, 3 N. E. 24; *Seward v. Arms*, 145 Mass. 195, 13 N. E. 487.

It appears that the trustee had in its possession \$16,521.42 which was due to the defendant on account of business done by other railroad companies whose railroads formed, with the railroads of the defendant, and the trustee, continuous lines, of which only the railroad of the defendant joined that of the

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trustee. The total charge for all this business was collected either at the place of starting or at the place of destination, and accounted for to the companies that were entitled to it. For the sake of convenience, it was a custom of each company having money to pay to the others to pay to the one whose railway adjoined its own not only the amount due that company, but also all sums belonging to the other companies beyond; and the company receiving the money retained what was due to it, and forwarded the residue. Accounts were kept by each only with the company owning the railways next adjoining its railway on each side of it, and the trustee kept an account only with the defendant, crediting to the defendant and paying it not only the sums due to it, but also the sums due on account of such business to the other companies; and no distinction was made in the accounts or items between money paid to the defendant as belonging to it, and money paid to it belonging to the said other companies. Under these facts, money credited to the defendant on account of the earnings of railroads beyond its lines it would take only as the agent and trustee of such railroads. This part of the case is covered by the decision in Chapin v. Connecticut River Railroad Company, 16 Gray, 69, which is shown by an examination of the papers on file to be identical with this case in its material facts. See, also, Seward v. Arms, 145 Mass. 195, 13 N. E. 487. For this money the trustee cannot be charged.

The answer shows that \$2,154.18 was held by the trustee, which was due to the defendant on account of earnings from business done on the Ogdensburg & Lake Champlain Railroad. This road the defendant was operating under a lease, with many special covenants, given by that corporation to the Consolidated Railroad Company of Vermont, and assigned by a formal assignment and by another elaborate instrument of transfer to the defendant. Under the original lease all of the gross receipts from the business and traffic of the railroad and other property were to be received by the lessee, and were to be disposed of by it in the manner stated. The lessee then covenanted to keep and maintain the railroad and its equipments and all property pertaining to it in good order and condition, making renewals of cars and engines and other things needed; to pay all taxes and assessments upon the property, and to pay expenses of meetings of directors and stockholders of the lessor; to assume and pay the expenses of pending litigation; to fulfill outstanding contracts and obligations of the lessor; to assume all obligations of the lessor that might afterward be incurred by statute or at common law as common carriers, warehousemen, or otherwise, and indemnify and save harmless the lessor from all costs, damages, or loss by reason of any failure to fulfill these obligations, and by reason of any claim that might arise from the maintenance and operation of the railroad and other property; to keep policies of insurance in force, for the benefit of the lessor, upon the buildings, bridges, and docks of the lessor, and other

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property then kept insured by it; and, in the discretion of the lessee, to keep in force such policies of insurance as it might deem advisable to protect it from loss by virtue of its liability as a common carrier. The lessee was also to keep accurate accounts of its earnings and income from the railroad and other property, and of its expenses and disbursements concerning the same, open to the inspection of the lessor, and was to furnish the directors of the lessor, whenever called upon, with accurate accounts and statements of the receipts and disbursements concerning the railroad and other property, to the end that the directors might, from time to time, determine the amount of net earnings applicable to the payment of interest on certain bonds outstanding against the lessor. The lessee then covenanted with the lessor that the gross earnings, income, and receipts from the business of the railroad and other property should be disposed of, first, for the payment of the obligations hereinbefore mentioned, and the other expenses of the maintenance, operation, use, development, and improvement of the railroad and other property, and the payment of certain floating indebtedness specified in a schedule; second, for the payment of interest on certain first mortgage bonds outstanding against the lessor, and afterwards to the payment of interest on certain other bonds of different classes, and then that the residue and remainder should be divided equally between the parties.

The contention of the trustee is that, all the gross earnings of this railroad which the defendant collected in its management of the property, it received and held as a trustee and that the money in its hands was not subject to attachment for its debts or liabilities incurred in the business or otherwise. We are of the opinion that this contention is not correct. The defendant was in the possession and control of the railroad. It was bound to the lessor by a variety of covenants which created a direct liability at law. It was its duty, as the lessee in possession of the railroad, to conduct the business, and, in so doing, to contract debts from day to day in the operation of the railroad, as if it were the owner. It was its duty to pay these debts, and the payments were to be deducted from the gross earnings, to determine the net earnings in which the lessor had an interest. Upon the theory of the trustee in this case, the defendant was acting as a trustee in the possession and operation of the railroad, and in the collection of every bill for the transportation of merchandise, and in incurring every debt that it contracted in the course of the business. Upon this theory, every one who had a valid claim, small or great, whether in contract or in tort, growing out of its possession and operation of the railroad, was a cestui que trust under the instrument, and could bring a suit in equity to have the trust enforced against the gross earnings for his benefit. We do not think that this is the true construction of the instrument. We are of opinion that the debts contracted in operating the railroad were primarily the lessee's debts, and

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that the lessee was expected to collect the earnings as primarily its own moneys, keeping accurate accounts of what it received and paid out. Much of the indebtedness contracted, which the defendant had a right to pay, depended to a large extent upon the exercise of its discretion. It hardly could have been intended that there should be a specific trust affecting the gross earnings in reference to the payment of every item of the operating expenses. The general provisions of the instrument indicate that the lessee was to conduct the business as a proprietor, and not as a trustee, and that its possession and control should be that of a lessee bound by the covenants of the instrument. If at any time the lessee should be guilty of such a breach of its contract as would put in peril the rights of the lessor, probably the lessor would have a remedy in equity for the protection of its interests. But in reference to such a condition there is a provision for a re-entry and termination of the lease by the lessor, similar to that contained in common leases. We are of opinion that, so long as the defendant was left in possession and control of the property and assets, it could receive the gross income as its own money, and use it for the payment of its own debts, holding itself accountable to make payments under its covenants. The cases of *Grand Trunk Ry. v. Central Vermont R. Co.* (C. C.) 78 Fed. 690, *Grand Trunk Ry. Co. v. Central Vermont R. Co.* (C. C.) 81 Fed. 60, and *Welden Bank v. Smith*, 86 Fed. 399, 30 C. C. A. 133, all of which relate to this instrument, do not seem to us inconsistent with this view. Of course, after the property came into the hands of a receiver appointed by a court of equity, the court would marshal and appropriate income which accrued to the receiver according to the requirements of the contract under which he held. We are of opinion that the trustee is chargeable with this sum, as money subject to attachment for the defendant's debts.

The sum of \$10,686.71 due to the defendant on account of earnings of the Consolidated Railroad Company of Vermont stands in much the same way. The defendant had a lease of this railroad and the property pertaining to it for 99 years. Its provisions, differing somewhat in details, are very similar to those of the lease which we have just been considering. It contains a provision for an entry and a termination of the lease in case of breach of covenant continued for three months after a notice in writing from the lessor. We are of opinion, for reasons just stated, that the money received for gross earnings of the railroad, so long as the lessee was in undisturbed possession in the performance of its covenants under the lease, were to be taken and held as its own moneys, and accounted for to the lessor. We are of opinion that the trustee is chargeable for this sum, also.

The remaining question is whether the trustee is chargeable on account of the cars of the defendant which it had in its possession. Of these, two, which were marked with the defendant's name, belonged to the Burlington & Lamoille Valley Railroad

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Company, and twenty-five others so marked belonged to the Ogdensburg Car Company. The plaintiff does not contend that the trustee should be charged for these cars. One hundred and seventeen of the other freight cars and three passenger cars and two baggage cars were a part of the property leased to the defendant by the Consolidated Railroad Company of Vermont, with its railroad, on June 30, 1884, by an instrument already referred to. They were also covered by a prior mortgage made by the last-mentioned corporation and the Vermont & Canada Railway Company to the American Loan & Trust Company, which included their respective railroads, to secure the payment of certain bonds, which mortgage was then in full force, although it has since been foreclosed by a sale of the property. The only title of the defendant was, therefore, that of a lessee for 99 years under an instrument containing many covenants, among which was a covenant to keep this property in good condition, and replace it with other like property when worn out, and a covenant giving the lessor a right at any time, after a short notice, to enter and take possession and terminate the lease for a breach of covenants. Such a title is not an ownership which subjects the property to attachment, in the absence of statutory provisions giving a right of attachment. In Vermont there are statutes relating to furniture, cars, and engines of railroad companies which indicate a general purpose of the Legislature to subject them to attachment for debts and liabilities incurred in the management and operation of the railroad. Rev. Laws Vt. 1880, §§ 3300, 3353, 3443. The second of these sections makes all such property a part of the realty which passes under a mortgage when such a conveyance of a railroad is made. But it leaves it liable to attachment and execution against the mortgagor on a claim for an injury sustained on the railroad by negligence of the corporation, or for services rendered or materials furnished to keep the road in repair or to operate the same, or for liabilities as a common carrier. This section gives no right to attach such property of a railroad corporation upon a claim against a lessee of the railroad. Section 3443 is broader, giving a right to attach cars, engines, and other property used in the operation and management of a railroad, upon a claim for an injury to person or property by the corporation operating the railroad, provided the property has at any time been owned by the corporation liable for the injury. This section would give a right to attach the cars in these suits if the cars had at any time been owned by the defendant.

It is contended that the title of the defendant as lessee was an ownership, within the meaning of this section. But we are of opinion that this title, which was subject to be terminated at any time, on short notice, for a breach of covenant, and which was subject to a prior mortgage that made the property a part of the realty held by the mortgagee, and was also subject to a covenant to keep it in good condition for the benefit of the lessor, and

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to return it or other like property in its place at the termination of the lease, was not an ownership, within the meaning of this section. It follows, therefore, that as to these cars the defendant had no such title, either at common law or under the statutes of Vermont, as was necessary to subject the property to attachment upon a claim against it.

There are five cars that stand a little differently. These were not acquired by the defendant under its lease, but were bought and put upon the railroad in performance of a covenant in the lease to keep the rolling stock in good condition, and to replace it when worn out. Perhaps it might be held that these cars were owned by the defendant at the time of the attachment, or had been owned by it, and were within the terms of section 3443, above referred to. Assuming this in favor of the plaintiff, there are other grounds on which the trustee is discharged from liability on account of them. The passenger car No. 86 and mail car No. 50 were making a regular passage on a train passing over the trustee's railroad to Boston, and were intended, after completing the passage, to depart again within 48 hours upon a regular return passage from Boston over the trustee's railroad and other railways, to a railway of the defendant, and did so depart and make such return passages. The baggage car No. 22 was making a regular passage upon another train through New Hampshire under similar conditions. The freight car No. 5,318 was also in transit, and, according to the answer, was then making a regular passage in a train passing over the railroad of the trustee, which was about to stop at different stations on the way, and the fixed times of its departure from such stations were on the same day. These cars were all within the provisions of Rev. Laws, c. 167, § 39, and could not be attached in the absence of a demand by the officer for other property upon which to make the attachment, equal in value to the *ad damnum* in the writ. It is contended that this section does not apply to an attachment of cars and engines by trustee process. But we are of opinion that it does. There is no exception in the language, and the reason for its application is as strong in one case as in the other. On service of trustee process, the party having possession of the cars and engines could not protect himself against the effect of allowing them to go back into the hands of the defendant without holding them and preventing the running of the trains. These cars cannot be held under the attachment.

The only other car referred to in the answer is freight car No. 7,828, which was on a side track in Vermont. Effect could not be given to an attachment of this car unless the trustee should bring it to Massachusetts, and there, at the proper time, deliver it to the officer holding the execution. The trustee was under no obligation to do this. Rev. Laws, c. 189, § 59, applies only to property which the trustee is bound by contract to deliver at a certain time and place within the commonwealth. But the rule

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there stated is analogous to the general principle which is applicable to attachments by trustee process. While we do not determine that under no circumstances can an attachment by trustee process of specific property outside of the commonwealth be made effectual, we are of opinion that, as a general rule, and upon facts like those in this case, such an attempted attachment is invalid. Our courts have no jurisdiction over the property itself while it is in another state, and we have no authority over the trustee to compel him to bring it here. *Van Camp Hardware Co. v. Plimpton*, 174 Mass. 208, 211, 54 N. E. 538, 75 Am. St. Rep. 296. The trustee cannot be charged on account of the possession of this car.

The result is that the trustee is to be charged according to the order and ruling of the judge of the superior court. So ordered.

WALKER *v.* ILLINOIS CENT. R. CO.

(Supreme Court of Illinois, June 23, 1905.)

[74 N. E. Rep. 812.]

Railroad Right of Way—Deed—Title Conveyed.*—A deed to a railroad company of a right of way for the purpose of constructing, maintaining, and operating a single or double track railroad, with all necessary appurtenances and for all uses and purposes connected with its construction, repair, and maintenance, etc., does not convey the fee to the strip, but only the right to use it perpetually for right of way purposes.

Same—Excessive Use—Number of Tracks—Compensation.—Where a grant to a railroad company was of a strip 200 feet wide across grantor's land for right of way for the purpose of constructing, maintaining, and operating thereon a single or double track railroad, the company was not so limited in the use of the strip that it could not

*As to the title acquired, by deed or condemnation proceeding, in land conveyed or condemned for a railroad right of way, see note appended to *Shreveport & R. R. Val. Ry. Co. v. Hinds* (La.), 13 Am. & Eng. R. Cas., N. S., 325; *Cincinnati, H. & D. Ry. Co. v. Wachter* (Ohio), 11 R. R. R. 469, 34 Am. & Eng. R. Cas., N. S., 469 (rights retained by grantor); *Chicago, P. & St. L. Ry. Co. v. Vaughn* (Ill.), 10 R. R. R. 162, 33 Am. & Eng. R. Cas., N. S., 162 (where life tenant gave railroad quitclaim deed, it took no greater interest than that of its grantor); *Boyce v. Missouri Pac. R. Co.* (Mo.), 4 R. R. R. 496, 27 Am. & Eng. R. Cas., N. S., 496 (nature of easement); *Jones v. Van Bochove* (Mich.), 1 Am. & Eng. R. Cas., N. S., 664 (deed construed to convey easement only); *Territory of New Mexico v. United States Trust Co. of New York* (U. S.), 14 Am. & Eng. R. Cas., N. S., 811 (grant of public land); *Hicks v. Smith* (Wis.), 20 Am. & Eng. R. Cas., N. S., 694 (fee acquired by warranty deed); *Jones v. Erie & Pa. R. Co.* (Pa.), 3 Am. & Eng. R. Cas., N. S., 18 (grant of right of way on street or highway subject to rights of the public); *Northern Cent. R. Co. v. Harrisburg & M. Elec. R. Co.* (Pa.), 6 Am. & Eng. R. Cas., N. S., 151 (property of railroad in its right of way); *Charleston & W. C. Ry. Co. v. Hughes* (Ga.), 11 Am. & Eng. R. Cas., N. S., 541 (eminent domain); *Lime Rock R. Co. v. Farmsworth* (Me.), 3 Am. & Eng. R. Cas., N. S., 13.

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maintain thereon any track or tracks in excess of a single or double track railroad, without being held to have placed an additional burden on the fee, entitling the owner to compensation.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Action by George C. Walker against the Illinois Central Railroad Company. From a judgment for defendant, the plaintiff appeals. Affirmed.

This was an action on the case, commenced by the appellant against the appellee in the superior court of Cook county to recover damages alleged to have been sustained by the appellant in consequence of the increased use by the appellee of its 200-foot right of way between Twenty-Second and Twenty-Fifth streets, in the city of Chicago, by erecting thereon more than a single or double track railroad, in violation of the terms of the grant of said right of way to it by Stephen A. Douglas; it being averred that the appellant was the owner of the fee of said right of way by mesne conveyance from said Stephen A. Douglas. The deed from Douglas to the appellee was made a part of the declaration, and is as follows:

"This indenture, made and entered into this 25th day of February, A. D. 1853, between Stephen A. Douglas, of the county of Cook and state of Illinois, of the first part, and the Illinois Central Railroad Company, of the second part, witnesseth: That whereas, the said Illinois Central Railroad Company contemplated the construction of certain lines of railroad, with branches thereto, as authorized by the act incorporating said company; and whereas, the said railroad has been located by the said company over and upon certain tracts of land owned by the said Stephen A. Douglas; and whereas, the said Stephen A. Douglas of the first part and the said Illinois Central Railroad Company of the second part did, on the 27th day of July, A. D. 1852, enter into an agreement respecting the said right of way and the consideration and damages to be paid therefor, which said agreement was in the words and figures following, to wit:

"This article of agreement made between Stephen A. Douglas of the first part and the Illinois Central Railroad Company of the second part, witnesseth: That the said party of the first part, for and in consideration of the payment of the sums of money hereinafter stipulated to be paid, agrees to compromise and liquidate the damages by him sustained in consequence of the location of the Chicago branch of the said road across and over his lands, to wit, the northeast fractional quarter of section 27, deducting eleven acres off the south end as per deed to other parties, and the south half of the northeast fractional quarter of section 34, in township 39 north, and range 14 east, on the following terms: The said company is to pay the said Douglas at the rate of \$1,500 per acre for the land and water covered by the location of said road 200 feet wide over and across said

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first-named tract, and at the rate of \$1,000 per acre for the land and water covered by the location of said road over and across the said second-named tract, it being distinctly stipulated and understood between the said parties that the said Stephen A. Douglas expressly reserves and said company expressly concede to the party of the first part all title, right, and ownership to the land and water between the eastern line of said road and the center of Lake Michigan, and bounded by due east lines from the north and south ends of each of said tracts. And in consideration of the stipulations aforesaid, the said Douglas does hereby agree to convey and concede to the said company, for the use of the said road, all the easements, rights, privileges, and immunities which the said company would have had if the right of way had been condemned and confirmed by legal proceedings under the laws of the state of Illinois and in pursuance of the charters of said company. In witness whereof these presents are signed by the respective parties hereto this 27 day of July, 1852.

“ ‘The Illinois Central Railroad Co.,

“ ‘By Robert Schuyler, Prest.

“ ‘S. A. Douglas.

“ ‘In presence of

“ ‘A. J. T. Vanderventer.

“ ‘R. S. Van Vooest.’

“Therefore, in affirmance of the said agreement, the said Stephen A. Douglas of the first part, for and in consideration of the sum of \$21,310 to him paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said Illinois Central Railroad Company and to their successors and assigns, for the purpose of constructing, maintaining, and operating thereon a single or double track railroad, with all its necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad, the right of way for the same over and through the following tracts or parcels of land situate, lying, and being in the county of Cook and state of Illinois, bounded and described as follows: The northeast fractional quarter of section 27, deducting eleven off the south end thereof as per deeds to other parties; also so much of the northeast fractional quarter of section 34, in township 39 north, of range 14 east of the third principal meridian, as is owned by said Douglas, bounded on the north by the land of Soren and Henry Groves, on the east by Lake Michigan, on the south by the land of S. Ellis, and on the west by the western boundary of said quarter section. Said right of way over and through the lands and premises above described to include and comprise the width of 200 feet, to be taken 50 feet on the west side and 150 feet on the east side of said railroad, measuring from the center of the track, there

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being in the first-named tract hereby conveyed nine acres and eighty-nine hundredths and in the other tract six acres and forty-nine hundredths, as said road has been surveyed, located, and established by said company, particular reference being had to a map or plat of said lands and the said railroad track over and through the same, filed and recorded in the office of the recorder of the said county of Cook, together with all the tenements, hereditaments, profits, rights, privileges, and appurtenances thereunto pertaining. To have and to hold the same unto the said Illinois Central Railroad Company, their successors and assigns, forever, for all lawful uses and purposes for which the right of way could have been obtained in pursuance of the charter of said company. And it is distinctly stipulated and understood by and between the said parties that the said Stephen A. Douglas expressly reserves and the said Illinois Central Railroad Company expressly concedes to the said party of the first part all title, right, and ownership to the land and water between the eastern line of said railroad and the center of Lake Michigan and bounded by due east lines drawn from the north and south ends of each of said tracts of land: provided, however, that if the said Illinois Central Railroad Company, or their successors or assigns, shall at any time hereafter cease permanently to occupy and use said railroad, or the said track shall be abandoned or the route thereof changed so as not to be continued over and through the premises hereby conveyed, then and in that case the said lands and premises hereby granted shall revert to the said Stephen A. Douglas, or whoever may be lawfully entitled to the same. And it is understood that said Illinois Central Railroad Company shall erect and maintain such crossings as may be necessary to the accommodation of persons whose lands are divided by the said track, and shall also erect and maintain such lawful fences as will divide the lands occupied by said company from the adjoining lands on each side, and as far as practicable prevent intrusion upon or passage across the lands and railroad occupied by said company.

“In witness whereof the said Stephen A. Douglas of the first part and the said Illinois Central Railroad Company of the second part have executed this indenture in duplicate, and have hereunto affixed their signatures and seals this 25th day of February, A. D. 1853.”

The appellant dismissed as to the second count of his declaration and amended the first count, whereupon the court sustained a general demurrer thereto, and, appellant having elected to stand by his declaration as amended, the court dismissed the suit at his cost, and he has prosecuted an appeal to this court.

Dupee, Judah, Willard & Wolf, for appellant.

J. G. Drennan and *Sidney F. Andrews* (*J. M. Dickinson*, of counsel), for appellee.

HAND, J. (after stating the facts). The briefs filed by the

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respective parties have been limited to the consideration of one question only, which is, is the appellee, under the terms of its grant from Stephen A. Douglas, as found in the deed which is made a part of the declaration, limited in its use of said 200-foot strip, conveyed to it for right of way purposes, to the construction, maintenance, and operation of a single or double track railroad thereon, with necessary appurtenances, or may it devote the entire strip to track purposes, if it deem such use necessary for the proper and successful operation of its railroad?

The first proposition discussed is whether the appellee, by virtue of said deed, took a fee in said 200-foot strip, or merely an easement. There can be no question but that the appellee, under its charter and the statute in force in this state at the time it received said deed, had the power to acquire a fee; but we think, upon consideration of all the provisions found in said deed, that it did not acquire the fee to said strip, but only the right to use the same perpetually for railroad right of way purposes. The land contained in the strip was not conveyed to the appellee, but its use. The interest, however, which the appellee acquired in said strip, was absolute for the purposes for which it was acquired, so long as it was used for railroad right of way purposes. In *Hazen v. Boston & Maine Railroad Co.*, 2 Gray, 574, it was said (page 580): "The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." And in *Chicago & Mississippi Railroad Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65, this court, on page 202 of 16 Ill. (61 Am. Dec. 65), speaking through Mr. Justice Scates, said: "I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes." And in *Illinois Central Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, it was held that the right of way was the exclusive property of a railroad company, upon which no unauthorized person had the right to be for any purpose. And in *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246, Mr. Justice Redfield said: "The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose." In *Illinois Central Railroad Co. v. Houghton*, 126 Ill. 233, on page 241, 18 N. E. 301, on page 304, 1 L. R. A. 213, 9 Am. St. Rep. 581, where the court was considering a deed very similar to the deed now under consideration, it was said: "While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that it conveyed an estate which, so far as the right of possession for railroad purposes is concerned, had

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most of the qualities of the fee. The right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns for purposes of grazing or agriculture, or as a part of the farm to which it originally belonged." To the same effect is *Illinois Central Railroad Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563.

It is clear from these authorities that appellee acquired the right to use said 200-foot strip absolutely for railroad right of way purposes, and that the appellant, as grantee of Douglas or otherwise, had or could acquire no interest therein which he could assert as against the appellee so long as the strip was used by the appellee for railroad right of way purposes, unless the right of the appellee to use the same is limited in some way by the deed from Douglas to it; and this brings us to the main contention of appellant, which is that by the use of the words found in the deed, "for the purpose of constructing, maintaining, and operating thereon a single or double track railroad," the appellee is so limited in the use of said strip that it cannot maintain thereon any track or tracks in excess of "a single or double track railroad" without being held to have placed an additional burden upon the fee, for which the appellant is entitled to recover damages in the nature of compensation. We cannot accede to this view. The grant by Douglas to the appellee was of a strip 200 feet wide across his land for right of way purposes. This grant was absolute and without limitation, and the words, "for the purpose of constructing, maintaining, and operating thereon a single or double track railroad," cannot be held to restrict or limit that use. Had the grantee provided in the deed that no other track than a single or double track railroad should be ever constructed upon said 200-foot strip, there would be force in the contention of the appellant; but such language is not found in the deed. The general rule is that words following the granting clause of a deed, which state the use to which the property granted is to be put, are not restrictions or limitations upon its use, unless it is specifically so stated to be in the deed. *Board of Supervisors of Warren County v. Patterson*, 56 Ill. 111; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364. The rule above announced is usually held to apply only where a fee has been conveyed. Still, in a case like this, where the use of the strip has been conveyed for railroad right of way purposes, and its exclusive possession is necessarily to be vested in the railroad company to fulfill the object of the grant so long as it shall be used for railroad right of way purposes, we are of the opinion no reason exists why such rule should not be applied to such conveyance.

The rule is also well settled that in construing written instruments all parts of the instrument should be considered in arriving at the intention of the parties thereto, and when the intention of the parties is ascertained it will be carried out. If this entire

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instrument, which amounts to something more than a deed, is considered, we think it is clear that the grantor intended to convey to the appellee the entire 200 feet for right of way purposes, and that he did not intend to limit the appellee in its use thereof to a 16-foot strip, which would be the effect of the grant if the contention of appellant were sustained. The deed provides "the same"—that is, the 200-foot strip—shall be held by the appellee, "their successors and assigns, forever, for all lawful uses and purposes for which the right of way could have been obtained in pursuance of the charter of said company," and the contention of the appellant that the only grant made to the appellee was the right to use said strip upon which to construct, operate, and maintain "a single or double track railroad," with its appurtenances, is too narrow, and is inconsistent with all the provisions found in the deed from Douglas to appellee, with the exception of the words, "for the purpose of constructing, maintaining, and operating thereon a single or double track railroad," when segregated from the context. In construing a deed or other instrument in writing, it is not permissible to select a few words from the instrument, and base a construction thereof upon a consideration of those words alone, but the entire instrument should be considered. An elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them. *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

It appears from the declaration the agreement to convey was executed by Douglas on July 27, 1852, and that the deed was executed on February 25, 1853; that two tracks were placed upon the right of way subsequent to the contract and prior to the execution of the deed; that since the year 1879 the said railroad company has constructed and operated on said right of way eleven tracks more than the two above mentioned, without permission or consent of any kind from said Douglas or any one claiming under him, including the appellant; that one of said tracks was constructed in the year 1880, that two were constructed in the year 1883, and others in the year 1888. It thus appears that the railroad company, by its course of action in constructing and operating these various tracks, showed that it construed the deed as giving it full authority to place as many tracks on said strip as it saw fit and to take exclusive possession of said 200-foot strip for right of way purposes. The appellant claims to have been the owner of the fee in this right of way since January, 1878. During all the time intervening between that time and the bringing of this suit on the 16th day of December, 1899, from aught that appears, he stood by and made no protest to the construction placed on the deed by the railroad company. We think this is strong evidence that he construed the deed himself in the same manner as the railroad company

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had done. A contract is to be taken in the sense in which it was in fact understood by one of the parties to the knowledge of the other, when a new contract will not be made thereby. *Street v. Chicago Wharfing & Storage Co.*, 157 Ill. 605, 41 N. E. 1108. It is allowable always to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning. No extrinsic aid can be more valuable. *Vermont Street M. E. Church v. Brose*, 104 Ill. 206. A reasonable construction placed upon an indefinite or uncertain contract by the conduct of the parties will be adopted by the courts. *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719.

From a full consideration of this record we are of the opinion that the trial court did not err in sustaining a demurrer to said declaration. The judgment of the superior court will be affirmed. Judgment affirmed.

AMOS KENT LUMBER & BRICK Co., Limited, v. TAX ASSESSOR OF PARISH OF ST. HELENA *et al.*

(Supreme Court of Louisiana, March 27, 1905. On Rehearing, May 22, 1905.)

[38 So. Rep. 587.]

Taxation — Exemptions — Application of Statute — Logging Railroads.*—Though owned by a limited company, and having for its primary and principal function the carrying of logs to a sawmill, a railroad which runs regular trains for freight and passengers, with a fixed schedule of charges, is entitled to the exemption accorded by article 230 of the Constitution to "any railroad, or part of such railroad," constructed within certain specified dates.

On Rehearing.

Same—Same—Same.*—The purpose of the framers of the Constitution, as expressed in article 230 of that instrument, was to encourage the building of railroads open to the public, and the traffic upon which shall be regulated by the law applicable to common carriers, rather than the multiplication of corporations, and a railroad, or part of a railroad, which meets those requirements, and was constructed and completed after the adoption of the Constitution, and prior to January 1, 1904, is entitled to the exemption, whether owned and operated by a corporation, a private society, or an individual.

Nicholls, J., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of St. Helena; Clay Elliott, Judge.

Action by the Amos Kent Lumber & Brick Company, Limited, against the tax assessor, and others, for the parish of St. Helena. Judgment for defendants, and plaintiff appeals. Modified.

*For all the authorities in this series on the subject of logging railroads, see foot-notes appended to *Healy Lumber Co. v. Morris* (Wash.), 12 R. R. R. 171, 35 Am. & Eng. R. Cas., N. S., 171.

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Harry Hinckley Hall and Obadiah Pierson Amacker, for appellant.

Robert S. Ellis, Dist. Atty., and *Milton Alexander Strickland*, for appellees.

Walter Guion, Atty. Gen., for the State.

PROVOSTY, J. The sole question in this case is whether plaintiff's railroad is a "railroad," within the meaning of article 230 of the Constitution, reading as follows:

"There shall also be exempt from taxation, for a period of ten years from the date of its completion any railroad, or part of such railroad, that may be hereafter constructed and completed prior to January 1st, 1904. * * *"

The road is a narrow-gauge railroad, constructed as an adjunct to the sawmill business of the plaintiff, for the purpose of transporting logs to its mill. Its name is the Kentwood, Greensburg & Southwestern Railroad. Its length is not stated in the record. One of its termini is a point just beyond the town of Greensburg, in the parish of St. Helena. The other is probably the mill of the plaintiff, somewhere in the parish of Tangipahoa. It has a length of ten miles in the parish of St. Helena. Two trains, drawn by locomotives, are run daily—a log train and a freight and passenger train. The freight and passenger train makes one trip daily. The log train makes two trips. It has a caboose attached, and carries passengers. Sometimes it also carries freight. The rates are the same as those fixed by the State Railroad Commission, but the road has never made any report to the commission, or otherwise subjected itself to its jurisdiction. There is in the record the following admission:

"It is admitted by defendant in this case that the Kentwood, Greensburg & Southwestern Railroad carries freight and passengers."

How long the road has been in existence, and how long it has been carrying freight and passengers, are not shown by the record, except that there is testimony to the effect that in 1898 the road extended into the parish of St. Helena a little over a quarter of a mile. The testimony is that the road holds itself out to the world as a common carrier. It is practically admitted that if the road is a railroad, within the meaning of article 230 of the Constitution, it is entitled to the exemption.

The article exempts "any railroad." Now, if this road, with its roadbed and cross-ties and parallel rails, on which steam locomotives draw regular trains for the transportation of freight and passengers, is not a railroad, a pertinent inquiry would be, what is it?

Defendants' learned counsel says that "the railroad meant by article 230 of the Constitution is the same railroad meant by article 272—a common and public carrier, organized and operated by a duly chartered railroad company, endowed with all the rights and bound to the public by all the responsibilities, of

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such carriers"—and that plaintiff is a mere limited liability company, incapable of owning and operating a railroad. The article (272) referred to reads as follows:

"Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies public carriers."

No doubt, this article has no reference to a mere private railroad; but it does have reference to a railroad which, like plaintiff's, holds itself out to the public as being engaged in the business of transporting freight and passengers for hire, at a fixed tariff of charges. Such a railroad is a common carrier. A. & E. Ency. of L. (2d Ed.) vo. "Common Carrier."

The argument of counsel assumes that a limited company or a private individual cannot own and operate a railroad, but that is a mistake. "Railroads may be owned by private individuals." A. & E. Ency. of L. vol. 23, p. 674. Nor does article 230 restrict the exemption to railroads owned by corporations, but, on the contrary, extends it, in the broadest terms, to "any railroad." This term, no matter how strictly it is construed, will embrace the railroad in question, which, in form and in use, is a railroad.

That part of the judgment appealed from relating to the railroad is alone involved in this appeal. Of the other part of plaintiff's demand this court has no jurisdiction.

It is therefore ordered, adjudged, and decreed that, in so far as it bears upon the railroad herein involved, the judgment appealed from be set aside; that the said railroad be decreed to be exempt from taxation under article 230 of the Constitution; and that the assessment complained of be reduced by the amount of \$20,000, the estimation of said railroad. Defendants to pay the costs of both courts, excepting the attorney's fees decreed by the judgment appealed from to be charged as costs, as to which the judgment appealed from is reduced in proportion with the reduction made in the amount of the assessment by the present judgment, but is otherwise to remain unchanged.

NICHOLLS, J. (dissenting). I dissent for the reason that, in my opinion, the only railroads which can legally claim exemption are those which have acquired and taken upon themselves, under the law, the legal status of common carriers, and bound themselves, under the law, to retain and continue such status during their legal existence. The corporations referred to are those which have subjected themselves forcedly to permanent governmental regulation and control to the service of the public. It was easy for the plaintiff corporation to have placed itself in that position, but it has not as yet done so.

On Rehearing.

MONROE, J. A rehearing was granted in this case at the instance of the Attorney General, who desired to be heard on behalf of the state, and who had not been apprised of the pendency of the suit until after it had been decided.

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It is said that "it is only railroad companies or corporations proper that are entitled to the exemption provided by article 230 of the Constitution of 1898"; that the plaintiff corporation, having been established under Act No. 36, p. 27, of 1888, has no authority to operate and maintain a railroad; and hence that it is not entitled to the exemption.

The answer to this, as we think, is that the purpose of the framers of the Constitution was to encourage the building of railroads, rather than the multiplication of corporations, and they accordingly declared that:

"There shall be exempt from taxation, for a period of ten years from the date of its completion, any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1st, 1904."

This exemption has been extended by the amendment adopted in 1904 "to any railroad, or part of a railroad, that shall have been constructed and completed subsequently to January 1st, 1905, and prior to January 1st, 1909," and has been made to include and apply to all the rights of way, roadbed, sidings, rails, and other superstructures upon such rights of way, roadbed, or sidings, and to all depots, station houses, buildings, erections, and structures appurtenant to such railroads and the operation of the same. Act No. 15, p. 19, of 1904. For the purposes of the exemption, we are therefore of the opinion that it is wholly immaterial whether the railroad is built and operated by a corporation, a private society, or an individual.

It is true that in the same article of the Constitution (230) the word "railroad" is used to express the idea of an artificial or juridical personage, with a capacity for intelligent action, it being provided that the exemption shall not apply to improvements, etc., "which may be constructed by railroads now in operation," etc.; but the fact remains that the exemption was intended to encourage the building of actual roads, and that the language used applies to actual roads, or parts of roads. Upon the other hand, there can be no doubt that the word is thus used in the sense in which it is commonly understood (i. e., as meaning a highway open to the public, within the meaning of article 272, and the traffic upon which is regulated by the law applicable to common carriers), and that it has no application to a road owned or operated either by a corporation or an individual exclusively for its or his own purposes, or for the carriage of passengers or freight selected by or belonging to the owner or operator.

It may be true that the plaintiff is without authority, under its charter, to maintain and operate such a railroad as is entitled to the exemption in question; but the Civil Code declares that whilst corporations unauthorized by law "enjoy no public character * * * these corporations may acquire and possess estates and have common interests as well as other private societies." Civ. Code, art. 446. Assuming, therefore, that, for the purposes of the operation of a railroad, no such corporation as the plain-

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tiff exists, there is nevertheless a private society which owns, or there are individuals who own, and operate, a railroad, or part of a railroad, over which the business of a common carrier is conducted, and which had been constructed since the adoption of the Constitution of 1898, and was completed prior to January 1, 1904; and it is to the property, and not to the owners, that the exemption applies. We therefore conclude that there was no error in the judgment heretofore rendered, and it is accordingly reinstated and made the final judgment of the court.

NICHOLLS, J., dissents.

STATE v. NEVADA CENT. R. CO. *et al.*

(Supreme Court of Nevada, May 11, 1905.)

[81 Pac. Rep. 99.]

Taxation — Railroads — Cash Value—Computation—Method.*—The cash value of a railroad for purposes of taxation must be determined mainly by its net earnings capitalized at the current rate of interest, taken in consideration with any immediate prospect of increase or decrease in earning capacity; and if the utility of the road, as so determined, is not equal to its cost, which is *prima facie* its value, then the value must be determined by utility alone.

Same—Net Income—Gross Receipts—Expenditures.—The net income of a railroad for purposes of taxation is the difference between the gross receipts and expenses as they would have been under reasonably economical and prudent management.

Same — Earnings—Expenditures—Classification—Evidence.—On an issue as to the earning capacity of a railroad for purposes of taxation, classifications of items of expense by the railroad company in its ledger or other accounts are not evidence in its favor, except as they are substantiated by the original entries of the transactions in the railroad's books.

Same—Books—Production—Waiver.—Where, on an issue as to the earning capacity of a railroad for purposes of taxation, the railroad's books were not placed in evidence, but each party sought to prove a result from them through the examination and opinion of an expert, and each objected to the opinion of the opposing witness, without making any objections as to the books themselves, the introduction of the books was waived.

Same—Presumptions—Expenditures.—On an issue as to the earning capacity of a railroad for purposes of taxation it would be presumed, in the absence of a contrary showing, that charges for things essential to the operation of the road represented reasonable and economical expenditures.

Same—Experts—Opinions.—Prac. Act, § 427 (Nev. Comp. Laws,

*For the authorities in this series on the question as to how to estimate the value of a railroad for purposes of taxation, see *Oregon & C. R. Co. v. Jackson County* (Ore.), 22 Am. & Eng. R. Cas., N. S., 98 (how to estimate "cash value" of railroad under Sess. Laws 1893 Oregon, p. 6); *State v. Board of Assessors* (La.), 4 Am. & Eng. R. Cas., N. S., 386 (determination of net earnings); *Weir v. Norman* (U. S.), 13 Am. & Eng. R. Cas., N. S., 861 (valuation of intangible property).

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§ 3522), provides that there shall be no evidence of the contents of a writing other than the writing itself, except when the original is lost or destroyed, or in the possession of the adverse party, and he fails to produce it after notice; when the original is a record or other document in custody of a public officer or officer of a corporation; when the original has been recorded, and a certified copy is made evidence by a statute; and when the original consists of numerous accounts or other documents, which can not be examined in court, and the evidence sought by them is only the general result of the whole. Held, that where, on an issue as to the earning capacity of a railroad for purposes of taxation, whether certain charges of expense were legitimate, and whether earnings other than those shown should not have been received, was disputed, it was error to permit expert accountants, who had examined the corporation's books, to give parol evidence of their opinion as to what the railroad's net earnings should have been by such witnesses' making an arbitrary classification and exclusion of debits and credits.

Same—Classification of Items—Submission to Court.—Where, on an issue as to the earning capacity of a railroad for purposes of taxation, whether certain items of debits and credits should be included was disputed, such items should be properly classified and submitted to the court for its determination, and opinion evidence of expert accountants as to such determination was inadmissible.

Same—Offers to Purchase.—On an issue as to the value of a railroad for taxation in 1901, evidence of an offer of \$200,000 for the road, made to its general manager in 1900 by parties who had neither the intention nor the ability of buying for themselves, but who made the offer on behalf of certain others, who were not shown to have been able to have consummated a sale, was inadmissible.

Same—Taxes Paid.—On an issue as to the value of a railroad for purposes of taxation, taxes actually paid by the railroad should be added to its operating expenses and deducted from its gross income.

Same—Mortgages—Bonds—Stock.—On an issue as to the value of a railroad for purposes of taxation, evidence that a mortgage had been given of all the railroad's property to secure bonds for \$750,000, that 7,500 shares of stock had been issued of a par value of \$100 a share, and that a certain county had issue \$200,000 in bonds in aid of the road, was admissible as tending to show its cost.

Same—Tax Rate—Validity—Presumptions.—The Nevada revenue act provides that county commissioners may levy an ad valorem tax in each county of \$2 on each \$100 valuation, provided that no levy in excess of \$1.50 per \$100 shall be made for county purposes, unless the county is indebted for liabilities contracted prior to January 1st next preceding the making thereof, not bonded or funded. Held, that, in the absence of proof that a county levying a tax in excess of \$1.50 per \$100 was not indebted for liabilities contracted prior to the year of the levy, it would be presumed in support of the levy that it was so indebted.

Same—Witnesses—Competency.—Where a witness had not made computations of railroad earning balances for a series of years, as to which he was asked to testify, and did not know whether such balances were correct, nor what items they included, he was not entitled to testify thereto.

Action by the state against the Nevada Central Railroad Company and others. Judgment for plaintiff, and defendants appeal. Remanded for new trial.

This is an action by the state for the taxes for the year 1901 on 93 miles of main track and 2 miles of side track and the other real property of the Nevada Central Railroad Company, all sit-

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uated in Lander county. The assessor placed the valuation at \$158,100, and made the assessment at \$5,684.97, which, with the statutory penalties, aggregates \$8,063.43, the amount demanded in the complaint, and for which the verdict and judgment were rendered. After denying the allegations of the complaint, the answer sets up the defense that the assessment was out of proportion to and above the cash value of the property, and asserts that in the year 1901 the property was not of any greater cash value in the aggregate than \$60,944. It is also alleged that the tax levy in that county for the year 1901 is illegal because in excess of the rate authorized by law. Seeking to avoid penalties for delinquencies, the defendant made and pleaded a tender of \$1,835 for taxes upon this property. Upon the trial the state introduced the delinquent list and rested. Thereupon the defendant submitted in evidence the minutes indicating that the taxes levied by the board of commissioners for that year for county purposes aggregated \$1.57 on each \$100 of taxable property, and introduced testimony showing that the road was finished in February, 1880; that it has iron rails weighing only 35 pounds to the yard, instead of much heavier steel rails used by all up to date railroads; that the ties are in poor condition; that for the most part it is ballasted only with sage brush dirt; that the cost of repairs in future years will be increased, and that the condition of business in the adjacent county will not tend to increase earnings; that, if the Southern Pacific Railroad cuts off the curve at Battle Mountain, and runs directly by the river as surveyed, and evidently contemplated by the purchase of rights of way, the Nevada Central will be compelled to build two or three miles of new track in order to connect; that the removable value of the material which constitutes the 93 miles of road and all the property under the levy was \$41,135.35 in 1901; that the rate of interest on different classes of loans in Lander county that year varied from 6 per cent. to 12 per cent.; that San Francisco saving banks paid $3\frac{1}{8}$ per cent.; that money in New York was worth $3\frac{1}{2}$ per cent. to 5 per cent., and that United States bonds paid less than 2 per cent. per annum. There was testimony that so large an amount could not be placed in Lander county. Subject to the objection and exception of counsel for the state, J. M. Hiskey, the secretary and auditor of the Nevada Central Railroad Company, as a witness on its behalf, was allowed to testify that he had examined the books and vouchers of the company, and that for the calendar year 1901 the expenses from operation were \$38,372.28, the earnings from operation \$37,737.29, the loss from operation \$634.99, and that, in addition to this loss, the company paid \$953.03 for taxes on its personal property for that year. Counsel for the defendant asked the witness if the company were not liable for the amount of taxes that the jury would assess in this case. The objection to this question was sustained. We quote from the record an important part of the examination of A. J.

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Maestretti, a witness for the state, regarding the income and expenses of the road: "Q. Have you examined the books of the Nevada Central Railroad Company for 1901? A. I have. Q. What is the result? Mr. Street: One moment, I desire to examine the witness as to his qualification as an expert accountant. Q. You have never kept books for a mercantile firm? A. I have not. Q. You never had any practical experience in bookkeeping did you? A. No, sir. Q. You took a course in Heald's Business College, did you? A. Yes, sir. Q. In that course, did you have any instruction whatever in railroad bookkeeping? A. Yes, sir; the course was designed to cover all branches of commercial and business bookkeeping. Q. Respecting the result of your examination of the books of the Nevada Central Railroad Company for 1901, I will ask you to state now if you included in this result all actual receipts of the Nevada Central Railroad Company for that year? Mr. Mayenbaum: I object. That question is entirely improper. Mr. Street: We desire to show by this witness that in the result which he is now called upon to testify about that he included fictitious receipts of money or sums which were never received by the Nevada Central Railroad Company at any time, or at all. We desire also to show that he did not include in the result actual expenses paid out by the Nevada Railroad Company during the year 1901, but used his own judgment in excluding items of expense which were actually paid in the year 1901 by the Nevada Central Railroad Company in the operation of its railroad, and we ask to examine the witness on this matter before he testifies to the result, for the reason, if our information is correct, the result would not be what is contemplated by the law, or competent in this case under any circumstances. Court: The question is not permitted. Mr. Street: We desire to note an exception to the ruling of the court on the ground that we have offered to show that this result about which the witness is asked to testify, and by the witness himself, included absolutely fictitious items of receipts never received by the Nevada Railroad Company in 1901, and in this result the witness did not include actual expenses of the Nevada Central Railroad Company incurred in its operation in the year 1901. Mr. Mayenbaum: You have stated that you examined the books of the company for 1901. I want you to tell me and tell the court and the jury what are the net earnings of that company in the operation of their railroad in Lander county for the year 1901. Just state to me the figures that you have arrived at as profits of the company for that year, and nothing else. Mr. Street: We desire to object, and make the same objection and exception as to the preceding question, and, further, this question does not show that it is any result of the entire books and figures of the Nevada Central Railroad Company respecting the matter inquired of for 1901. Mr. Mayenbaum: I mean the result of the entire books of the company. Mr. Street: We repeat our previous objection and exception,

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with the permission of the court. A. The result of my investigation shows that the Nevada Central Railroad Company should have made a profit of \$10,645.28 for the year 1901. Mr. Street: We object, on the ground that the witness is not testifying as expert. Court: The objection is overruled. Mr. Street: We take an exception on the ground stated in the objection. I also desire to add that he has not testified as an expert on the actual result of the books of the company, and we move to strike out the answer of the witness on the ground that it is incompetent, and does not come within the provision of the statute. Court: The motion is overruled. Mr. Street: We note an exception on the same ground." Cross-examination by Mr. Street: "Mr. Street: You did include in your computation from which you figure this result a lot of items for receipts you knew never were actually received by the Nevada Central Railroad Company? A. No, sir. Q. Will you state to the court or jury that you included nothing in the receipts you figured up except items of actual receipts—that means money actually received? A. I included nothing in the receipts you figured up except items of company which I examined. Q. Will you please answer my question clearly? A. There is one item which does not show actual cash receipts. Q. What is that item? A. It is a record of passes issued by the Nevada Central Railroad Company and used by the persons to whom they were issued. Q. So that the result you have testified to includes fictitious receipts which were not actually received in cash by the Nevada Central Railroad Company, does it not? Mr. Mayenbaum: We object. He testified to the profits, and only profits, of the company of that year, and has no knowledge only that shown by the books. Court: The question can be answered. A. The item of passes is one of the items charged, and, if this is a fictitious receipt, then it does include fictitious receipts. Q. Then there was no receipt of money shown at all by the Nevada Central Railroad Company for this item on its books? A. No, sir. Q. In your computation you used your own judgment in rejecting, and did not include in your result, a considerable number of actual items of expense of operation of the Nevada Central Railroad Company for the year 1901? A. I rejected items charged in the Nevada Central Railroad Company's books as items of expense in operation. Q. So the result you are testifying to is not the actual expense and earnings of the Nevada Central Railroad Company, is it, for the year 1901? A. No, sir; it is not the expense as shown by their books. Q. You are a railroad man? A. No, sir. Q. Have you worked on a railroad? A. No, sir. Q. In a railroad office? A. No, sir. Q. In machine shops? A. No, sir. Q. Never had anything to do with buying railroad supplies? A. No, sir. Q. You are by profession a lawyer? A. Yes, sir. Q. And you were formerly district attorney of Lander county? A. Yes, sir; and before that I was a rancher for years. Q. In this so-called result, did you figure any taxes of the Nevada Central Railroad Company for

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1901? A. No, sir. Q. You took upon yourself to exclude a voucher for taxes that you found, did you not? A. If I encountered any, I excluded them. Q. Do you know of a voucher or expenditure of the Nevada Central Railroad Company of \$953.03, paid November 30, 1901, by the Nevada Central Railroad Company, to T. H. Dalton, treasurer and tax receiver of Lander county, Nevada, for taxes on its item of personal property and certain land at Clifton, also its engines and cars? A. Yes, sir; I know of such a voucher. Q. And you did not include that in your result, did you? A. No, sir. Mr. Street: I desire to move to strike out the answer of the witness in his direct examination as to the result of his examination concerning the net earnings of the Nevada Central Railroad Company of 1901, for it is shown now conclusively by his own testimony that this result is not any result of the actual showing upon the books of the company at all; that the witness in reaching this result took upon himself the province of all the issues in this case, taking the province of the jury; and it is now shown conclusively that fictitious items of receipts were computed by him to reach his result. It is further shown that he purposely excluded actual items of expense actually paid by the Nevada Central Railroad Company in 1901, and the so-called result cannot be permitted to go to the jury in this case. Court: The motion is denied. Mr. Street: We desire an exception on all the grounds stated in the motion. We desire to have it explicitly understood that we do not waive any exceptions heretofore taken or objections heretofore made to the testimony of this witness, and we desire our objections to go to all of his testimony."

TALBOT, J. In order that a clearer understanding may be had of the essential facts, we have detailed important parts of the testimony relating to the main issue in the case—the true cash value of the road in 1891. It not being shown or contended that the prospective is greater than the present value, it depends largely upon the amount of earnings and expenses of operation. Following decisions in other states, this court long ago laid down the rule that the cash value of a railroad for the purposes of taxation—which means the amount at which the property would be appraised if taken in payment of a just debt from a solvent debtor—must be determined mainly by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in its earning capacity. The actual cost of the road may be shown, for, *prima facie*, that is the value. But if it appears that the actual cost was in excess of the necessary cost, the necessary cost is the proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so; or if, in short, the utility of the road is not equal to its cost, then its value is less than its cost, and must be determined by its utility alone. If the road does not pay current expenses, and cannot be expected

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to do so, then it is worth no more than the value of its movable material, less the cost of taking it up and getting it to market. *State v. C. P. R. R. Co.*, 10 Nev. 74; *State v. V. & T. R. R. Co.*, 23 Nev. 295, 46 Pac. 723, 35 L. R. A. 759. In the latter case it was said that railroads are bought and sold so seldom, and the value of each road depends so entirely upon its surroundings, that in determining the amount we must resort to principles other than those governing ordinary kinds of property which have a market value. It is apparent that a most important question here concerns the amount the road earns or ought to earn, and the necessary expenses of operation. As held by this court in *State v. V. & T. R. R. Co.*, 24 Nev. 80, 49 Pac. 945, 50 Pac. 607, the net income of a railroad, when necessary to be determined for the purposes of taxation, is the difference between the gross receipts and necessary expenses under reasonably economical and prudent management. The gross receipts to be considered for this purpose are not necessarily those in fact received, but such receipts as would be received under a reasonably economical and prudent management; and the expenses to be deducted in order to determine the net income are not necessarily the expenses which were in fact incurred, but such expenses as would be incurred under a reasonably economical and prudent management. It is earnestly claimed for the state that it was competent for the witness Maestratti to give the result of the items in defendant's books which he deemed properly chargeable as the expense of operation, and for him to reject or ignore in his answer other items that he did not consider so chargeable, and that he could give the amount that, in his judgment, the company ought to have earned beyond its actual receipts, and state the net amount that the company ought to have made that year. It is said in the brief that there are many things, such as a four-in-hand or the castle on the mountains at Austin, that even a stupid witness would know were not necessary in the operation of a railroad. For the defendant it is asserted that everything charged as expenses in its books is presumed to be necessary for its operation, and that the witness for the state could not give his conclusions which might overthrow this presumption. Are these contentions consistent with correct legal principles? If, as said by this court, 23 Nev. 294, 46 Pac. 724, 35 L. R. A. 759: "It is reasonable to suppose that the owners of a road will operate it to their own best advantage; that they will obtain all the income possible, and keep the expenses of operation as low as possible"—this does not raise any presumption, further than is shown by the transactions themselves as originally entered, that moneys paid out and items charged in the books were necessary for the operation of the road. Classification to expense or other accounts is in the nature of a written declaration in a party's own favor, made without the sanctity of an oath or the opportunity of cross-examination. It is as natural to conclude that a railroad company will pay interest

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on its bonds and meet its fixed charges, if not also that it will lay betterments, as it is to believe that it will meet its operating expenses. If it were the rule of evidence that a binding or other presumption would attach in favor of a railroad company for any items it may classify or charge in its own behalf to operating expenses, the same self-interest which, in the absence of any contrary showing, may be presumed to result in an economical management, might prompt the charging of doubtful and uncertain items to the expense account if a suit for taxes were anticipated. Unless admitted without objection, the nature of the items should be shown, or at least lumped into different classifications, in order that the court may determine whether they are properly chargeable as expense of operation. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Abbott's Trial Brief*, Civil, 322. This need not result in much delay or difficulty. Prior to the trial the accountant testifying may take the total of moneys received from fares, freight, or other sources, and classify and ascertain the amounts of the different kinds of expense, such as that shown by the pay roll for the usual employees of a road, for fuel, ties, and other material and supplies, which are admittedly or clearly necessary; and doubtful items can be separately listed or classified, and their amounts or totals brought to the attention of the court, and allowed to go to the jury or not, as the court, and not as the witness, may determine, unless a question of fact arise regarding the necessity for particular expenditures.

The error in allowing the answer of Mr. Maestratti giving his result regarding the net earnings to stand after he stated that he included such items as he deemed proper and rejected others which he thought improper is well illustrated by his failure to include the taxes a part of the operating expenses. It was equivalent to permitting the witness to tell the jury that the taxes ought not to be allowed as a part of the charges of operation for the year—a matter of law for the trial judge, and one previously determined by this court contrary to the opinion of the witness. The objection on the ground that it was a matter of law was promptly and properly sustained to the question put to Mr. Hiskey as to whether the company was liable for the taxes that the jury might assess for the year 1901. This witness was not permitted to testify for the defendant that the company was liable for its taxes, and, inferentially, that they were a necessary part of its expenses; but the witness for the state was permitted to give a result which, in effect, said to the jury that the taxes could not be allowed as part of the charges of operation. He included as a part of the receipts which the company ought to have earned the amount in fares that would cover the distances traveled on passes. Although these amounts should be included in determining what the earnings of the company ought to be unless the defendant showed that the passes were used by its employees, or in connection with the business of the road, and

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if the company wishes to be generous and carry passengers or freight for less than schedule rates, the ordinary value of the service rendered would be allowed in the estimate of what the road ought to earn, whether they should be so considered was question of law. The witness, as an accountant, could estimate and give the amounts or totals of those or other items specified or classified, and then it would be for the court to determine which of these should be considered by the jury.

As to what other items the witness included or rejected in arriving at his result we are not informed, nor were the district court or the jury further enlightened. No doubt many of the transactions shown by the books were properly placed in his estimate; but whether others were improperly so, whether he allowed items for expenses that ought to have been rejected, or rejected others that ought to have been allowed, as he did the payment by the company of the taxes on its personal property, and whether he classed as receipts anything that cannot be legally considered such, cannot be ascertained from his testimony or the record, because the items on which his result is based are not specified.

In this regard the testimony of Mr. Hiskey for the company is hardly more satisfactory. It is evident that his answer that the loss from operation that year was \$634.99 was based either upon his judgment as to the items allowable or upon the way they had been classified in the books, neither of which, as we have said, should control the province of the court in determining which are for the consideration of the jury when objection is made. Notwithstanding the wide discrepancy in their respective results, the estimate of a loss by the witness for the defendant and that the company ought to have netted over \$10,000 that year by the witness for the plaintiff, both may have been entirely correct in their additions, subtractions, and balances for which they had been called as expert accountants. So far as appears, they differed only in the items which they considered, and which were selected in the exercise of their judgment, instead of that of the court. If they had disagreed regarding the result or balances from the same transactions, or if there had been a conflict in their testimony pertaining to anything tangible, it would have been for the jury to determine between them. As it is, the testimony relating to the important issue in the case is based upon the opinion of one witness for the state and the different opinion of a witness for the defendant, or the way the company classified its accounts, as to whether the various items in defendant's books for that year were legally allowable as receipts or expenses of operation—verily a foundation more uncertain and less stable than the air cushion that supports the abutment of the Brooklyn Bridge. As said in *Hammersmith v. Avery*, 18 Nev. 229, 2 Pac. 55, the law requires a party to establish his case by the best evidence of which it is susceptible. It is the first entries of transaction in daybooks, journals, pay rolls, stubs, and

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books of original entry, rather than the secondary entries, that make them admissible; and subsequent classifications of these into expense, ledger, or other accounts are not evidence in a party's own favor, except as they are shown to be substantiated by the original entries which control. If the witness had classified these, and given the totals and remainders of the different groups, designating them by reference to the books or to tabulations which he had made from the books, the items from which he derived his results would have been apparent and fixed; so that, if any of these were in doubt, the court could determine in regard to their relevancy, instead of leaving this judicial function to the witness. Not only was it error to permit the witness to give his opinion on the questions of law, or, which was equivalent, a result based more or less upon his judgment in allowing or rejecting doubtful items, but it would have been improper for him to testify regarding the necessity for other items concerning which there was no doubt. That conductors, engineers, other ordinary employees, fuel, and ties were necessary in the operation of the road was a matter of common knowledge, concerning which the court and jury did not need the opinion of any witness. The presumption would arise that any money shown by the company's books to have been expended for these or for other purposes generally connected with the operation of a railroad were prudently and economically expended, but if the costs for building a castle or the payment of interest on bonds were charged in the expense account no presumption would arise from the fact that they were so charged that they ought to be deducted from the earnings in estimating the annual net income. They would show for themselves the contrary, and no witness should be permitted to testify that, in his judgment, they ought to be allowed or rejected. Matters of law and of common knowledge are directly for the court and jury. Every one knows that money expended for coal to generate steam to propel a locomotive and for the wages of an engineer is a legitimate charge in the operation of a railroad, and the presumption would arise that any money shown by the books to have been paid out for these purposes was a necessary expenditure. If it were sought to overthrow this presumption, witnesses possessing special knowledge or skill could be called to give their opinion that the amount of coal necessary for propelling trains, or the market price of coal, or the ordinary wages for such engineers, were less than the charges made.

The books were not placed in evidence on the trial in the district court, but, as each party sought to prove a result from them through the examination and opinion of an expert, and each objected to the opinion of the opposing witness without making any objections to the books themselves, it is apparent that their introduction was waived. Without consent or waiver, it would have been necessary to lay the usual foundation for their introduction by proving that they contained correct and original

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entries of the transactions made at the time they took place, or from permissive memoranda, before they, or evidence of their contents, could be received. To have secured their introduction, it would not have been necessary to prove that the various items scattered through daybooks or others of original entry had been carried to and properly classified in the expense of other accounts in the ledger, and such classification made by the defendant in its own behalf was not supported by any testimony as to its correctness, and was inadmissible, except so far as shown to be relevant by the transactions or charges themselves as originally entered. The mere classifications made by the defendant, or the conclusion of witnesses as to which items were properly allowable, were insufficient and incompetent to overthrow the presumption in favor of the correctness of the assessment made by the assessor under official oath, and presumably without interest between the state and the defendant, or to overthrow the burden cast upon the defendant to prove its allegation of overvaluation. By the admission of the books or the waiver of their introduction only such original entries as are material to the issue are to be considered as effecting the result. Until the contrary was shown by proof, there would be a presumption that charges for anything essential to the operation of the road, such as coal, ties, and ordinary supplies, and wages for usual employees, represented reasonable and economical expenditures. When no dispute exists, and no objection is made, it may be convenient to allow expert accountants to state the net earnings as shown by the books, and this testimony could stand as effectually as parol evidence given of a conveyance of real property, or a written contract where no objection is made to the nonintroduction of the writing. *Vietti v. Nesbitt*, 22 Nev. 397, 41 Pac. 151; *Watt v. N. C. R. R. Co.*, 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 62 Am. St. Rep. 772. If it were desired to supply the testimony of experts as to whether certain doubtful items were necessary for the operation of the road, or were for betterments, fixed charges, or useless expenditures, they should have been specified, so that the court and jury could have properly considered them. The witness *Maestratti* did not claim to be an expert other than as an accountant, but, if it had been shown that he or the witness *Hiskey* were the most experienced and eminent of railroad managers, it still would have been incompetent for either of them, whether on behalf of the state or the defendant, both of which should be governed by the same rules that apply to other litigants, to give their opinions on matters of law, which are for the court, or regarding commonly known facts concerning which the court and jury could determine as well as they. The duty of the accountant is to save the time of the court by striking totals and balances of such items as are relevant, but not to give his judgment as to what those items are without bringing them to the attention of the court. Section 427 of our practice act, being section 3522, Nev. Comp. Laws, is specific enough to exclude this opinion testimony.

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It provides that there shall be no evidence of the contents of a writing other than the writing itself, except: "First—When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made. Second—When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice. Third—When the original is a record or other document in the custody of a public officer, or officer of a corporation. Fourth—When the original has been recorded and a certified copy of the record is made evidence by statute. Fifth—When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the evidence sought by them is only the general result of the whole." The rule at common law, or in states without this statutory enactment, is the same. 1 Greenl. Ev. 93; *Burton v. Driggs*, 87 U. S. 136, 22 L. Ed. 299. The words "only the general result of the whole" naturally limit the answer of the witness to the whole of the accounts and vouchers or to the whole of particular accounts, tabulations, or items that are specified, and do not indicate that he may use his judgment in rejecting part of these without designating them. In *State v. Rhoades*, 6 Nev. 376, this court held that it was proper to ask an expert who had investigated the accounts in the State Treasurer's office: "What was the result of your examination as to the amount of money which should have been in the treasury on the 10th day of September, 1869?" In this question the word "should" had quite a different meaning and limitation than it had in the answer of the witness Meastratti. The amount that should have been in the state treasury was simply the difference shown by the books between all the receipts and all the disbursements, and did not imply that the witness was to exercise his judgment in excluding anything. It is a well-established rule that the opinions of experts cannot be received in regard to matters of inquiry that may be presumed to lie within the experience and knowledge of all men of average education moving in the ordinary walks of life. When the facts can be placed before the jury, and they are of such a nature that jurors generally are competent to form opinions and draw inferences from them, then the opinions of experts are not admissible. *Rogers' Expert Tes.* 26; *Franklin Ins. Co. v. Gruver*, 100 Pa. 273; *White v. Ballou*, 8 Allen, 408; *Hovey v. Sawyer*, 5 Allen, 554; *Perkins v. Augusta, etc., Banking Co.*, 10 Gray, 312, 71 Am. Dec. 654; *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Monroe v. Lattin*, 25 Kan. 351, 354; *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635; *Baltimore, etc., R. R. Co. v. Leonhardt*, 66 Md. 77, 78, 5 Atl. 346; *State v. Anderson*, 10 Or. 448; *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319; *Shafter v. Eveans*, 53 Cal. 32; *City of Chicago v. McGiven*, 78 Ill. 347; *Naughton v. Stagg*, 4 Mo. App. 271; *Cook v. State*, 24 N. J. Law, 843, 852; *Dillard v. State*, 58 Miss. 368; *Gavisk v. Pacific R. R. Co.*, 49 Mo. 274; *Concord Railroad Co. v. Greely*,

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23 N. H. 237, 243; Nashville, etc., R. R. Co. v. Carrol, 53 Tenn. 347; Linn v. Sigsbee, 67 Ill. 75; Veerhusen v. Chicago, etc., R. R. Co., 53 Wis. 689, 694, 11 N. W. 433; 16 Cyc. 852; 3 Wig. Ev. § 1918, and cases there cited.

Judge Campbell, in *Evans v. People*, 12 Mich. 35, said: "It is an elementary rule that, where the court or jury can make their own deductions, they shall not be made by those testifying." Lord Mansfield, in *Carter v. Boehm*, 3 Burr. 1905: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusions; and wherever the facts can be stated it is not to be departed from." *Cornell v. Green*, 10 Serg. & R. 16. In *Campbell v. Rusch*, 9 Iowa, 337, it was said: "In answering this question the witness was not communicating facts, but his own conclusions, drawn from the language used in the written instrument. This was not permissible. It was the special duty of the jury under the instructions of the court to draw conclusions, and for the witness to state facts. The exceptions to the rule are to be found in these cases where a witness speaks of matters of science, trade, and a few others of the same character, but they cannot be extended to cases like the present." Again, in *Lime Rock Bank v. Hewitt*, 50 Me. 267, and *Lawson's Ex. & Opin. Ev.* 166: "It was wholly inadmissible for the witness to state his inferences and presumptions arising from what appeared upon the books. By the well-established rules of law these were for the jury."

The exception to the rule as provided by the statute and the decision lies in allowing the accountant to state the result of arithmetical calculations that could be made by the court. When accounts are numerous, the convenience and expedition of trials demands the admission of the testimony of competent witnesses who have perused the entire mass and will state summarily the net result. Regarding this there is a collation of decisions in 2 Wig. Ev. § 1230. In *Adams v. Board*, 37 Fla. 283, 20 South. 271, it was said: "The witness in answer to the question detailed at length divers facts that he asserted to be shown by the records examined by him. There was no error in excluding this evidence. The contents of records cannot be shown by parol where the record itself is extant and accessible." In *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560, a tabulated statement prepared by an agent of railroad companies from the records showing the sale of tickets at a station during the year was held to have been properly admitted.

It was shown on the trial that an offer of \$200,000 for the road had been made to the general manager in 1900 by residents of

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Austin, or that he was asked whether the company would sell it for that amount. The witnesses who testified that they made the offer did not have that amount of money, and did not make it with any ability or expectation of buying the road for themselves, but pursuant to a statement made by a man named J. F. Mitchell, who was not present nor called as a witness, but who had previously said to J. A. Miller that "he had parties—good, responsible parties—to take it at \$200,000." There was no proof that Mitchell or the others to whom he referred had this amount of money, or were able to buy the road, nor that they knew anything regarding its value, nor that the general manager or any one with authority in reply to the offer said anything in the nature of a declaration against interest. Objection and exception were made to testimony of the offer on the ground that it "did not tend to prove the value in 1901." Counsel for the state suggested that the exception is too narrow. It may have been intended to object only for the reason that the offer was made in 1900, instead of 1901; but it is stated more broadly as not tending to prove the value of the road in the latter year, the one in which it was essential to determine the valuation as a basis for the taxes sought to be recovered. If the offer were sufficient to prove the value of the road in 1900, in the absence of any contrary testimony that value would be presumed to continue during 1901. However, we believe that under the circumstances shown the offer was not sufficient to show the value in 1901, or at any other time, and that the objection ought to have been sustained. In *Hammer-smith v. Avery*, 18 Nev. 229, 2 Pac. 55, it was said: "The evidence of the plaintiff as to the offer made him for the property should have been rejected, because, among other reasons, the person making the offer may not have known the value of the property;" and, quoting from *Fowler v. Com'rs*, 6 Allen, 96: "The value of an offer depends upon too many considerations to allow it to be used as a test of the worth of property." We do not wish to be understood as holding that cases may not arise in which it is permissible to prove an offer, or the declarations of a party in interest or authority in reply to one; but when, as here, it is not shown that the persons who made them had the means to meet them, or knowledge of the value of the property, we see no principle upon which they may be considered admissible. *Sharp v. U. S.*, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211, and other cases cited in appellants' brief.

The district court erred in refusing defendants' instruction No. 7, following: "You are instructed that in ascertaining the net income, if any, of the Nevada Central Railroad, for the year 1901, or the net loss, if any, you should add any taxes actually paid by the company for that year to the other necessary expenditures of the road, and deduct the same from the receipts of the road for that year; and in order to determine whether there will be any net income whatsoever, or to determine the loss from operation of the road, if a loss is shown, you must con-

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sider and deduct from the receipts of the road for 1901 such an amount for taxes for 1901 as you agree ought to be paid by the railroad company upon the property described in the complaint, which, in brief, consists of 93 miles of main railroad track and 2 miles of side track." It was held in *State v. V. & T. R. R. Co.*, 23 Nev. 297, 46 Pac. 723, 35 L. R. A. 759, that in determining the annual net income of a railroad the taxes should be deducted as a part of the expenses of operation. *State v. Railroad Co.*, 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042. In compliance with this rule, the instruction ought to have been given. But in determining the value of the road on the basis of its earning capacity capitalized at current rates of interest it should be given the benefit of the payment of its taxes only once, so that in ascertaining what the current rates of interest are the net yield on other investments after the payment of taxes on them should be taken as a guide. For instance, there was proof on the trial that 6 per cent. and 8 per cent. was paid on mortgages in Lander county. If the tax on these was paid by the mortgagee, and not by the mortgagor, they would be properly deducted from the interest rate in arriving at the net yield of the investment and the true earning value of the money placed in such mortgages. It could be shown whether the income from investments other than government bonds, which command a lower rate by reason of exemption from taxation, would be reduced by the usual tax rate.

Exception was taken to the evidence introduced on behalf of the state that the articles of incorporation of the Nevada Central Railroad Company provided for 7,500 shares of stock of a par value of \$100 a share, and that the company had made a mortgage in 1888 for \$750,000 on all its property to the Central Trust Company of New York, and that Lander county in 1879 issued \$200,000 in bonds to aid the building of the road. As said before, a railroad is different from ordinary property having a market value, and its cost may be shown. Under the circumstances the giving of the mortgage was in the nature of an admission that the property was worth the amount of the loan, and the value of the corporate shares and the amount of the bonds issued by the county to aid in the construction of the road had a tendency to show that these sums were a part of its cost, for the same presumption would attach that these moneys were economically used in its construction that prevails in regard to its operation. Presumably its cost is its value until the time a lesser or different value is shown. The presumption that the road is worth its cost continues until it is shown that it is less by reason of insufficient earning capacity to pay net current rates of interest on its cost, or from other causes.

Defendant further contends that the levy of \$1.57 for county purposes on each \$100 of valuation made the whole levy void under the following provision of the revenue act: "The board of county commissioners in each county of this state are hereby authorized and empowered to levy annually, on or before the first

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Monday in March, an ad valorem tax for county purposes not exceeding the sum of two dollars on each one hundred dollars value of taxable property in the county and such special taxes as may be authorized and required by law: provided, the total tax levy in any one year for all purposes shall not exceed five dollars on each one hundred dollars value of taxable property in any county or part thereof: provided, no levy in excess of one dollar and fifty cents on each one hundred dollars value of taxable property therein shall be so levied in any county of this state for county purposes unless the county is indebted for liabilities contracted prior to January 1st next preceding the making thereof and not bonded or funded." It was not shown that the county was not indebted for liabilities contracted prior to 1901, and the presumption is in favor of official action and the levy. This makes it unnecessary to determine whether such levy would have been invalid if it had been shown that no such prior indebtedness existed.

The defendant sought to have their witness Hiskey state the amount of the receipts and earnings of the road for the previous 10 years, as shown by the balances standing on the books. The testimony was properly excluded, because the witness had not made the computations, and did not know whether they were correct, nor what items they included, and did not bring them under the rule we have hereinbefore stated.

When the case is tried again, the court can determine whether there is evidence to cover or warrant the modification to instruction No. 5. We have examined the other specifications treated in the elaborate and interesting briefs, but find no error in regard to them.

The cause is remanded for a new trial.

FITZGERALD, C. J., and NORCROSS, J., concur.

LARSON *et al.* v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota, April 4, 1905.)

[103 N. W. Rep. 35.]

Dedication—Public Ways—Acts Constituting Dedication.*—After a railroad company had built its tracks, a town site situated on both sides thereof was established, with streets extending across the tracks. Under the direction of the company's division superintendent a crossing was constructed at the crossing of one of the streets, and

*See *Hast v. Piedmont & C. R. Co.* (W. Va.), 8 R. R. R. 108, 31 Am. & Eng. R. Cas., N. S., 108; note appended to *Southern Ry. Co. v. Hooper* (Ga.), 17 Am. & Eng. R. Cas., N. S., 752; *Evansville & T. H. R. Co. v. State* (Ind.), 11 Am. & Eng. R. Cas., N. S., 278 (implied dedication of crossing over railway in street); *City of Chicago v. Chicago, Rock Island, etc., R. Co.* (Ill.), 1 Am. & Eng. R. Cas., N. S., 1 (whether leaving strips of land on either side of depot open to the public amounts to a dedication).

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a crossing sign was there erected. Snow fences contained openings in a direct line with the street. This street was the principal street of the town, and the town was built up with reference thereto. The crossing remained in place, and was constantly used by the public for about four years. Held, that though the division superintendent had no authority to make a valid dedication, and though his unexpressed purpose in making the crossing was merely to accommodate settlers coming in on trains, there was an implied dedication of the crossing to public use, and the company could not obstruct public travel thereon.

Appeal from Circuit Court, Roberts County.

Action by Fred Larson as president, and others as trustees, of the incorporated town of Summit, and the town of Summit, against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

John H. Perry, for appellant.

J. J. Batterton and Barrington & Lane, for respondents.

FULLER, J. The dominant question presented by this appeal from a judgment in favor of the plaintiffs and an order overruling a motion for a new trial is whether there has been an implied dedication and valid acceptance of that portion of Maple street which intersects the defendant's right of way in the incorporated town of Summit, and which is now completely obstructed by a snow fence, depot, and platforms erected by the railway company in the year 1895. The material facts may be briefly stated thus: During the year 1881 appellant constructed its railroad directly westward across the Sisseton & Wahpeton Indian Reservation, which became subject to entry and settlement under the homestead laws of the United States about the 15th day of April, 1892, and, pursuant to the federal statute relating to town sites, the judge of the county court filed a declaratory statement of his intention to claim, for the use and benefit of its inhabitants, what now constitutes the duly established town site of Summit, situated on both sides of appellant's right of way, and the same was duly surveyed, platted, and laid out into lots, blocks, streets, and alleys, all of which have since been continuously claimed, used, and occupied for town-site purposes. As shown by the recorded plat of the 80-acre tract constituting the town site, with reference to which the respective owners of lots and blocks have acquired unquestionable title, the streets all extend north and south at right angles across appellant's right of way, and over the main track and two side tracks within the corporate limits. Prior to the 15th day of April, 1892, the telegraph office, station house, and platforms of the company were located on what afterward became Beach street, one block west of Maple street, and after the reservation was opened for settlement all local shipments of merchandise and emigrant movables were unloaded at that place. A witness who was a section foreman in that locality from 1882 until 1897, and is fully corroborated by the undisputed evidence, testified in part as follows: "The town of Summit was started

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in 1892, and the first crossing over the railroad tracks in the town was at Maple street. Travel commenced across there in the spring of 1892. We put the crossing down with planks. We laid planks next to the rail, and then filled in with dirt and cinders. Mr. Nelson, the roadmaster, directed me to do this. I put up the crossing sign, 'Look Out for the Cars,' at about the time I put in the crossing. Mr. Nelson directed me to put up the crossing sign. There were three tracks there. The depot was a small building, and it was located west of there just a block. All tracks on that street were planked and fixed up that year. There was no other crossing over the railroad tracks within the limits of this town that year. Maple street is the street in which this building is located. It was then, and is now, the principal street of the town. Nearly all the travel out of the town in a northerly direction went across this crossing. There were two lines of snow fences north of where Maple street crossed the track, with openings. I cannot tell whether the opening was left at any one's request or direction. These openings were in a direct line with Maple street north. This road extended directly north to the north line of the plat. The first line of snow fence was about 100 feet from the track, and the second line was about 150 feet, and these openings were left in the snow fences as long as Maple street was used." The uncontroverted testimony clearly shows that, until obstructed by the new depot in the fall of 1895, this Maple street crossing thus established was maintained by the company, and used by the public, as the exclusive thoroughfare for persons having occasion to cross the right of way in coming in, going out, or passing through the town, and practically all the business structures within the corporate limits were erected on Maple street with reference to such crossing. On behalf of the respondents, C. H. Lien testified as follows: "I reside in Summit; have resided there a little over 10 years; came there in 1893. This crossing in dispute was open to travel then. I don't remember whether all the tracks were planked or not. The road I took in going out of the town to the north was over this crossing. There are 15 business houses on the west side of Maple street, and 21 on the east side, and they represent all the classes of business—stores, banks, restaurants, barber shops, and saloons. On other streets on the west side there is a livery barn, lumber yard, and blacksmith shop, and on the east side there is an implement dealer and shoe shop. The population of Summit is close to 500 inhabitants." With full knowledge that the town, covering the entire 80 acres, was platted into lots, blocks, streets, and alleys on both sides of the railroad track, and that improvements and conveyances of property were being made with reference thereto, appellant's roadmaster and division superintendent caused Maple street to be planked and put in good condition for general travel across its right of way, and erected the sign, "Look Out for the Cars," which remained in place until removed by the company in the

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fall of 1895. Although this crossing was constantly used from 1892 to 1895, inclusive, and in a manner that suggested an intention to dedicate the same as a public highway, appellant's roadmaster testified that his only purpose in making such improvements was to accommodate settlers coming in on trains with emigrant movables to be taken north of the track, and to enable teamsters to deliver to the business men of the town merchandise which had been taken from the cars and placed upon the platforms one block west of Maple street.

It may be stated as a general proposition that no particular formality is essential to an implied dedication or acceptance of land for a public use. Conduct on the part of the owner that is clearly expressive of an intention to dedicate usually amounts to dedication, if acted upon by the public in a manner which clearly justifies the inference of an acceptance. In *Mason v. City of Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802, it is said that: "One of the methods of acquiring the right to the use of land for a street is that of the implied dedication of the same by the owner of the fee. In an implied common-law dedication, the use of such land by the public as a street, with the knowledge of and without objection by the owner of the fee for a number of years, is evidence of such dedication; and from such user by the public, without objection by the owner of the fee, a jury may presume an actual dedication of such street to the public use." To the same effect are the following cases: *Alden Coal Co. v. Challis* (Ill.) 65 N. E. 665; *The City of Hammond v. Maher*, 30 Ind. App. 286, 65 N. E. 1055; *Chicago, R. I. & P. Ry. v. City of Council Bluffs* (Iowa) 80 N. W. 564; *Morgan v. Railroad Company*, 96 U. S. 716, 24 L. Ed. 743; *City of Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 8 L. Ed. 452. Leaving a gap in the snow fence on the north side of the track at the intersection of Maple street where the crossing was built and the usual sign erected as a danger signal is inconsistent with the statement that appellant intended to accommodate none but the patrons of the railway company. The evidence in the case and the topography of the town site make it reasonable to presume that a private crossing, instead of one for public use, would have been placed several hundred feet west of Maple street, near the depot and platforms where the passengers alighted and all local freight was unloaded.

While the division superintendent and roadmaster were without authority to make a valid dedication, their conduct, acquiesced in by the managing agents of the company for so long a time, is sufficient, when considered with all the other facts and circumstances in the case, to evoke the doctrine of equitable estoppel. With reference to such a dedication as this, Mr. Justice Swayne says: "The appellee insists that the record discloses a case of estoppel in pais, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the

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law. It not unfrequently gives triumph to right and justice, where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent. He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who had acted accordingly upon that belief." *Morgan v. Railroad Company*, 96 U. S. 716, 24 L. Ed. 743. Their secret intention is unavailable as to the inhabitants of the town who have expended large sums of money in the honest belief that a public railway crossing existed upon Maple street, where practically all the business buildings were erected. In volume 9 of the *American & English Encyclopædia of Law* (2d Ed.) at page 45, it is said: "When the dedication is beneficial to the public, an acceptance will usually be implied from the slight circumstances, or from user by the public for the purposes for which dedicated. No formal action of any particular body or individuals is necessary, but the acceptance may be implied from any acts of the public, generally, showing an intent to appropriate and use the property dedicated." Concerning the force and effect to be given testimony of an unexpressed intention in such cases, we quote from a recent Illinois decision, as follows: "It is insisted that the testimony now of former officers of the railway companies as to what their intentions then were will not alone be sufficient to revoke or nullify the acts or conduct from which the dedication is to be presumed, and that, where such acts or conduct have been acted upon by the city and the public, the presumption will be conclusive of the intention to dedicate the land to public use. The rule doubtless is that the intent testified to, not to dedicate, will not be permitted to prevail against unequivocal acts and conduct on the part of the owner inconsistent with such intent, and upon which the public had a right to rely." *The City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561, 38 N. E. 768. To the same effect are *Alden Coal Co. v. Challis*, supra; *Lamar v. Clements*, 49 Tex. 354; *The City of Columbus v. Dahn*, 36 Ind. 330; *Hulett, Adm'r, v. Hulett*, 37 Vt. 581.

The undisputed evidence shows that the building of the new depot on Maple street crossing, over the timely protest of the inhabitants, has resulted in material injury to the village, and occasioned persons residing on the north side of the track considerable inconvenience in getting in and out of the town. In *Whittaker v. Ferguson* (Utah) 51 Pac. 980, the rule applicable to a case like this is stated thus: "Where the public assume to appropriate land for public use, and the owner interposes no objection, but acquiesces in its continual use by the public for such a length of time that the public convenience and accommodation might be materially affected by an interruption of the enjoyment, an intention to dedicate will be presumed."

In view of the entire record, which contains many convincing

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facts not mentioned in this opinion, it cannot be said that the evidence before the trial court was insufficient to justify the conclusion that Maple street is a public highway, duly laid out, dedicated, and opened to the public throughout its entire length and across appellant's right of way.

There being no reversible error, the judgment appealed from is affirmed.

STATE v. CANADIAN PAC. R. CO.

(Supreme Judicial Court of Maine, May 6, 1905.)

[60 Atl. Rep. 901.]

Statutes—Construction.—Words in a statute are to be construed in reference to the subject to which they relate and the connection in which they are used, and where, in such connection, their meaning is ambiguous, the consequences of an interpretation made according to their ordinary and popular definition may be considered in determining their legal signification.

Taxation—"Railroad"—Scope of Term.—As used in section 42, c. 6, Rev. St. 1883, amended by chapter 145, p. 160, Pub. Laws 1901, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses, and other real estate incidentally used in its business, and from it the words "line or system" can not be disconnected. There is meant in this connection a railroad "operated as a part of a line or system extending beyond this state."

Same—Mileage Basis—Deductions.*—The mileage basis of apportionment in taxing railroads and other public service companies is eminently just, but there are exceptional cases where deductions should be made to prevent manifest inequality of value per mile.

Railroads—Franchise Tax—Mileage Basis—Deductions—Steamboat Lines.—A railroad may be, in a legal sense, considered a unit capable of proportionate subdivisions measured by miles; but where it is

*For the authorities in this series on the subject of the taxation of railroads on a mileage basis, see *State v. Back* (Neb.), 14 R. R. R. 99, 37 Am. & Eng. R. Cas., N. S., 99 (constitutionality of statute, providing for distribution of value of railroad property among the different taxing districts along the road, on a mileage basis); *Fargo v. Hart* (U. S.), 13 R. R. R. 737, 36 Am. & Eng. R. Cas., N. S., 737 (personal property of nonresident express company, situated outside of state, could not be taken into account in assessing its property within state, on mileage basis); *Chatham County Com'rs v. Seaboard A. L. Ry.* (N. Car.), 11 R. R. R. 859, 34 Am. & Eng. R. Cas., N. S., 859 (assessment based on a valuation arrived at by valuing the right of way as an entirety, and apportioning to the county such part of the whole value as the length of the road in the county bore to the entire road, was invalid); *State v. Aldridge* (Ohio); 4 R. R. R. 842, 27 Am. & Eng. R. Cas., N. S., 842 (apportionment among counties of taxes on rolling stock); *Baltimore, C. & A. Ry. Co. v. Commissioners of Wicomico County* (Md.), 21 Am. & Eng. R. Cas., N. S., 284 (constitutionality of statute providing for distribution of rolling stock among counties); *Detroit, etc., R. Co. v. Commissioner* (Mich.), 14 Am. & Eng. R. Cas., N. S., 174 (mileage does not include road operated in conjunction with another company); *Weir v. Norman* (U. S.), 13 Am. & Eng. R. Cas., N. S., 861 (valuation of intangible property of railroad on basis of mileage of lines within and without the state, not unconstitutional).

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especially chartered to own and operate, in connection with its transportation business, lines of steamboats across navigable waters beyond its termini, the length of such lines should be excluded from the computation in determining the franchise tax.

Same—Same—Same—Statute.—The spirit and intention of the statute are evidently to include only the miles of single track of actual railroad lines.

(Official.)

Action by the state against the Canadian Pacific Railroad Company. Debt, brought by the state of Maine against the Canadian Pacific Railroad Company to recover the semiannual installments of the excise tax assessed by the board of state assessors against said company for the year 1902. Agreed statement. Judgment for the state.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

George M. Seiders, Atty. Gen., for the State.

C. F. Woodard, for defendant.

PEABODY, J. . This is an action of debt, brought by the state of Maine against the Canadian Pacific Railroad Company to recover the semiannual installments of its excise tax for the year 1902. It is reported to the law court upon an agreed statement of facts to determine the legal construction of the statute section 42, c. 6, Rev. St. 1883, as amended by chapter 145, p. 160, Pub. Laws 1901, fix the amount of the tax in accordance therewith, and render judgment accordingly. The statute is as follows: "The amount of such annual excise tax shall be ascertained as follows: The amount for the gross transportation receipts as returned to the Railroad Commissioners for the year ending on the thirtieth day of June preceding the levying of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile do not exceed fifteen hundred dollars, the tax shall be equal to one half of one per cent. of the gross transportation receipts; when the average receipts per mile exceed fifteen hundred dollars and do not exceed two thousand dollars the tax shall be equal to three quarters of one per cent. of the gross receipts; and so on increasing the rate of the tax one quarter of one per cent. for each additional five hundred dollars of average gross receipts per mile or fractional part thereof; provided that the rate shall in no event exceed four per cent. When a railroad lies partly within and partly without the state, or is operated as a part of a line or system extending beyond the state, the tax shall be equal to the same proportion of the gross receipts in the state, as herein provided, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in the state shall be taken to be the average gross

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receipts per mile multiplied by the number of miles operated within the state." It provides for an excise tax upon a railroad based upon the average gross transportation receipts per mile of the railroad operated.

The defendant company operates, in connection with its railroad, several lines of steamships upon the Pacific Ocean and upon certain inland waters. It is claimed by the defendant that these steamship lines, with its main, double, and side tracks, form a composite line or system, whose length should be reckoned as the number of miles operated within the meaning of this statute. The total length of railroad and steamship lines combined was 15,633.7 miles, and the gross receipts of these combined lines were \$30,307,990.54, making the gross receipts per mile \$1,938.63. There being 232.8 miles in the state, the gross receipts in the state, if determined upon this basis, would amount to \$451,313.06. The tax would be at the rate of three-quarters of 1 per cent., amounting to \$3,384.84. The state assessors determined the amount of the tax on the basis of the length of single track of the whole line of railroad, excluding steamship lines, double and side tracks. The length of the single track was 7,563.3 miles. The gross earning of the railroad exclusive of steamship lines was \$27,925,229.98, making the gross receipts per mile \$3,692.20, and the gross receipts in the state \$859,544.16. The rate of the taxation would, on this basis, be $1\frac{3}{4}$ per cent., and the tax would be \$15,042.02. There has been paid on account of the tax \$4,808.50. The defendant resists the payment of the tax because (1) the assessors did not include in their computation the transportation lines across the Pacific Ocean; (2) they did not include the yard, siding, and second track lines in their computation.

The regularity of the proceedings of the board of state assessors is not otherwise questioned, and the constitutionality of our statute instituting the excise tax has been established by judicial decision in the case of *State of Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994. The sole question presented is the legal construction of the words "railroad," "line," and "system" in the last clause of the statute quoted. They should be construed according to their ordinary and popular meaning in connection with the subject-matter to which they relate. The word "railroad" comprehends not only the equipment and roadway, but the sites of depots, warehouses, and other real estate incidently connected with the business, including property which would properly be subject to local taxation independently of the excise tax. The signification of the words "line or system" depends upon the subject to which they are applied and the connection in which they are used. They have not, in themselves, a meaning so clear and explicit that they must be interpreted according to their ordinary and popular meaning, regardless of the consequences of interpretation. *Endlich* on Int. Stat. § 26; *Clark v. Maine Shore Line R. R. Co.*, 81

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Me. 477, 17 Atl. 497; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; 4 Bacon's Ab. 652. They are used in a statute which provides a franchise tax upon railroads for the right and privilege of doing business in the state in their corporate capacity, and defines the basis upon which the tax is to be determined; and the purpose of the statute and the language used in other parts of the section must be considered in interpreting these words. Endlich on Int. Stat. §§ 35-41. The tax is not upon the business of the railroads as property, but it is an annual sum having reference to their gross transportation receipts returned to the Railroad Commissioners in proportion to their mileage in the state; and to find this sum these receipts are divided by the number of miles of railroad operated to determine the average gross receipts per mile; and when the railroad lies partly within and partly without the state, or is operated as a part of a line or system extending beyond the state, the receipts over its whole extent are divided by the total number of miles operated to obtain the average gross receipts per mile. It seems obvious that the words "line or system" cannot be disconnected with the word "railroad," of which they are predicated. It is a railroad "operated as a part of a line or system extending beyond the state." It is claimed by the defendant that the punctuation is significant as separating the words "line or system" from the word "railroad," but the force of the word "such" preceding them requires this punctuation. The full rendering of the clause is: "The gross transportation receipts of a railroad which lies partly within and partly without the state, or a railroad which is operated as a part of a line or system extending beyond the state, as the case may be, over its whole extent within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile; and the gross receipts in the state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the state."

The defendant company was chartered by the Canadian Parliament in 1881, with authority to construct lines of railroad, and in addition to own and run steam and other vessels; and consequently was not operating its railroad in this state at the time the present method of taxing railroads was adopted. The words "line or system," first used in the statute of 1881, did not expressly apply to any railroad having authority to acquire lines of steamers and steamships for carrying on, in connection with their railroad business, transportation business across the American Continent, including its navigable waters, and across the Pacific Ocean. It cannot be presumed that the Legislature contemplated, when it adopted the present rule of determining the amount of the excise tax, railroads having as a part of their lines and systems steamboat and steamship lines over navigable waters. The reverse would be true, for a corporation formed for the purpose of constructing and operating a railroad cannot, unless special powers and authority are granted under the gen-

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eral law or by a special statute of a state, engage in the business of running steamboats and steamships beyond its terminus. This would be as distinct from railroad transportation as the business of express, telegraph, or pipe-line companies. *Pearce v. Madison, etc., R. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Shawmut Bank v. Plattsburgh, etc., R. Co.*, 31 Vt. 491. The physical conditions governing the operation of such transportation companies are unlike those pertaining to railroads, and, while they would be subject to an excise tax, it might not be equitable or reasonable to determine the amount by the same rules. And it is to be considered that steamboat lines, instead of passing over territory, for which states could properly impose a tax, pass over inland waters or waters of the ocean, public highways, which subject them to no burden of taxation. Several of the states have adopted the mileage basis of apportionment in taxing railroad and other public service companies; and some besides Maine assess the tax on the amount of gross transportation receipts, and others variously on profits, cash values of property, or capital stock. This method has been held by the United States Supreme Court to be not only legal, but eminently fair. Mr. Justice Brewer, in *Pittsburgh, etc., R. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, says of the statute of Indiana, which places the tax on the cash value of railroad property: "It is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road." To the same effect is the opinion by Mr. Justice Miller in *State R. R. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. This view is also approved in other cases relative to excise taxes on gross receipts, income, or value of the franchises. *Del. R. Tax Case*, 18 Wall. 206, 21 L. Ed. 888; *Erie R. R. v. Pa.*, 21 Wall. 492, 22 L. Ed. 595; *Western Union Telegraph Company v. Mass.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pa.*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Charlotte Columbia, etc., v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; *Columbus Southern Railway v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238; *Maine v. Grand Trunk Railway*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994. These cases recognize the fact that there may be exceptional cases where deduction should be made to prevent a manifest inequality of value per mile, but holding generally that a railroad can be considered a unit so far as to be capable of fair proportionate subdivisions measured by miles. The statute of Michigan expressly excludes from the computation the number of miles of water roads over navigable waters of the United States and within the state. It would be difficult to find a case where the miles of a line of transportation should more properly be excluded in computing the tax than that of

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s or steamships, whose water roads are untaxable, and as are defined by no fixed limits, but subject to voluntary and such as is occasioned by winds and currents.

nk the contention of the state that the spirit and intention of the statute are to include only actual railroad lines as on the face of the earth, and operated as such, should be considered.

ment for the plaintiff.

ECKERT *et al.* v. PENNSYLVANIA R. Co.

Supreme Court of Pennsylvania, March 20, 1905.)

[60 Atl. Rep. 781.]

of Live Stock—Delivery to Connecting Carrier—Safe Care.—A railroad company transports horses beyond its own line, it has the duty of delivering them at the terminus of its road to the connecting carrier in a car suitable to transport them to their destination.

Transferring to Unsuitable Cars—Liability of Initial Carrier.—A carrier takes horses for transportation beyond its own line, transfers them to an unsuitable car, and they are thereby injured, for the loss.

Notice of Claim.*—In a contract to transport live stock, a requirement of notice of a claim for damages to be made within a certain time is valid.

Same—Question for Jury.—Where a carrier of live stock has knowledge of injuries to them within the time limited, or notice thereof has not raised any question as to the want of notice, a year and a half thereafter, the question of formal notice is for the jury.

—Limiting Liability.†—A carrier can not limit its liability by contract.

Freight—Action—Tort or Contract.‡—A shipper may, at his option, bring either an action on contract or in tort for injuries to freight.

from Court of Common Pleas, Berks County.

by Isaac Eckert and A. B. Cummings against the Pennsylvania Railroad Company. Judgment for plaintiffs, and appeals. Affirmed.

authorities in this series on the subject of notice of claims on railroads, see foot-notes appended to *Chicago, B. & Q. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 504.

foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo Co.* (N. D.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504; appended to *Ragsdale, H. & W. v. Southern Ry. Co.* (Ga.), 120, 35 Am. & Eng. R. Cas., N. S., 120.

foot-note appended to *Atlantic & P. Ry. Co. v. Laird* (U. S.), 9 Am. & Eng. R. Cas., N. S., 365; *Louisville & N. R. Co. v. Hine* (Ala.), 382, 35 Am. & Eng. R. Cas., N. S., 382; foot-note appended to *Southern Ry. Co. v. Rosenberg* (Ala.), 22 Am. & Eng. R. Cas., N. S., 418; *Mobile, etc., R. Co. (Miss.)*, 21 So. 240, 6 Am. & Eng. R. Cas., N. S., 772.

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On a rule for judgment non obstante veredicto, Endlich, J., filed the following opinion:

"(1) This is an action of trespass, in which the plaintiffs declare against defendant as a common carrier, alleging that they delivered to it, and it received, six valuable race horses for transportation from Reading to Readville, Mass., there to be delivered to plaintiffs in good condition, the car selected for the purpose being a Burton car; that, in disregard of its duty and negligently, defendant, in the course of transportation, removed the horses from said car into one unsuited for their safe carriage; and that by reason thereof the horses were injured, and reached their destination in a damaged condition. The essential part of this averment is the neglect of the defendant to perform its common-law duty of safe carriage, not the failure to carry the horses to their destination in a Burton car. In view of the allegation of negligence, the change of cars was in itself of no moment. It was the unsuitableness of the substituted car for the transportation of horses of the character and value of these—i. e., the failure to observe due care according to the circumstances, with the consequent injury to the horses—that furnished the cause of action laid. Neither the relation of the parties to each other, nor the defendant's duty resulting therefrom to exercise due care, however, sprang from the terms of the express contract. They arose from the defendant's receipt of the horses for transportation as a common carrier, and its legal obligations as such in respect thereto, which could not be bargained away. It cannot, therefore, be successfully maintained that the action ought to have been in assumpsit upon the express contract. The rule is stated in 1 Chitty, Pldg. p. *151, that, 'although there be an express contract, still, if a common-law duty result from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract.' And accordingly it has been settled in this state, at least as far back as *Smith v. Seward*, 3 Pa. 342, and *Porter v. Hildebrand*, 14 Pa. 129, that a common carrier is liable for his negligence in carrying goods intrusted to him in an action ex contractu or in an action ex delicto, at the election of the party suing.

"(2) The contract contemplating transportation to Readville, Mass., and payment being made for the whole of it, it became a part of defendant's duty to deliver the horses to the connecting carrier at Jersey City in proper shape for further transportation. It might perhaps have been claimed on behalf of plaintiffs, under another form of action, that the defendant by its contract had agreed that the whole of the trip should be made by the horses in the Burton car (see *R. Co. v. Schwarzenberger*, 45 Pa. 208, 215, 84 Am. Dec. 490), and that in substituting another it took every risk of injury attributable to the change, regardless of the question of negligence in the selection, etc., of the substituted car. But that is not the claim made, and its admissibility need not, therefore, be considered. The plaintiffs' case is founded on

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an allegation of negligence by defendant in the performance of a duty strictly within what it assumed by its contract. The defendant had accepted the horses for transportation in the Burton car. As agent for the owners of that car it had received payment for the use of it over, and as carrier payment for, the entire trip to Readville, Mass. It had encouraged the plaintiffs to expend money and to intrust to it and risk their property upon the faith of an undertaking which it entered into without having informed itself as to its ability to carry it out, and which it found itself unable to carry out. When, at Jersey City, the connecting carrier refused to accept the Burton car because of its size, defendant was not absolved from the remainder of its bargain. Safe delivery is included in the undertaking to transport (*Graff v. Bloomer*, 9 Pa. 114, 115)—in this case, safe delivery to the connecting carrier (*R. Co. v. Schwarzenberger*, 45 Pa. 208, 84 Am. Dec. 490). Necessarily that means delivery in good condition, and in such shape as to be handled by the connecting carrier. Defendant could neither keep the horses at Jersey City for the owner to come and take them away, nor unload them and turn them adrift. It was bound to forward their shipment towards the final destination named in the contract; doing the best it could both in selecting a car reasonably adapted for the purposes, and the best adapted that could be had, and in seeing to it that the car selected was in suitable condition to receive and carry the horses with safety. In so doing it was bound to have regard to all the conditions of which it had notice—the season, the length of the journey accomplished and still ahead, the delay already experienced, with its natural effect upon nervous animals, the character and value of the latter, and so on—in a word, to use proper care according to the circumstances. A failure of duty in any of these particulars would constitute negligence. And if, either by a negligent selection of the car into which the horses were to be removed, or by an inadequate preparation of it for their reception, defendant exposed the animals to undue risk of injury, it is difficult to see by what method of reasoning it can be exonerated from the consequences attributable to such want of care.

“(3) It will not do to say that the horses being attended, under the contract, by plaintiffs’ employees, their submission to a removal into the car designated by defendant was tantamount to an approval of it by the plaintiffs. The references in the contract to such employees very clearly show that their function was well understood on all hands; being simply to look after the wants of the animals, and take care of the shippers’ property while being transported according to the contract. There is nothing in the latter which would invest them with any power to vary the contract, or release the carrier from any duty devolving upon it under the same. So far as the contract goes, they had nothing whatever to do with the means of transportation, or the method or manner in which defendant might choose to carry out its con-

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tract in respect thereto. It was their business to stay with the horses, feed them, water them, keep them in order, and do the best they could for them in whatever situation the defendant might place them. It is, of course, true that greater powers might have been given them by the plaintiffs. But of such there is no evidence in the case. It cannot be presumed that the owners of racing stock as valuable as this, who went to the trouble themselves to select and inspect the car in which the animals should travel, and who themselves made the contract with the defendant specifying that car, would delegate to employees such as these the right to annul their action, and agree to the substitution of something else, regardless of its fitness. The case of *Squire v. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162, is distinguishable from the present one on a variety of grounds, one of which is that there the making of the contract itself was delegated by the shipper to his employee who attended the shipment, and who thus occupied, upon the face of the transaction, a very different position from that of plaintiffs' employees in this case.

"(4) Whether, in truth, the defendant's choice of another car was a negligent one, under the circumstances, and whether the injuries sustained by the horses were due to its defective condition, the slipperiness of the floor, etc., taken together with its peculiar construction, were, under the testimony, controverted questions of fact, determinable only by the jury. The defendant was not, of course, responsible for injuries resulting wholly from rough handling by the connecting road. But if the defective condition of the car contributed to the injurious effects of such handling, and aided in bringing about the injuries, the defendant was responsible, on the familiar principle that where an injury is produced through the negligence of a third party, concurring with that of defendant, the latter is nevertheless liable. *Cooley*, Torts, p. 684; *Patterson*, Ry. Accid. Law, p. 413; *Lockhart v. Lichtenthaler*, 46 Pa. 151; *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31, 33, 34, 12 L. R. A. 268, 23 Am. St. Rep. 192.

"(5) The requirement in the contract of notice of injury and claim of damages to be given under affidavit to a designated office of the defendant company at Philadelphia within five days from the date of the removal of the stock from the car was one which the defendant might waive, its purpose being protection to the carrier. *Pavitt v. R. Co.*, 153 Pa. 302, 307, 309, 25 Atl. 1107. There are, indeed, authorities under which what took place in this case on the arrival of the horses at Readville, between one of the plaintiffs and the agent of the connecting road, might be held to dispense with the notice and claim of damages. *Ry. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013. But it is not necessary to invoke the principle of those decisions—that the agent of the connecting carrier at the place of delivery is, in cases of through consignments, to be treated as the agent of the receiving carrier for the purpose of affecting it with notice of the condition of things at the time of arrival, etc. It has been so often

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decided that a reference to the recent cases of *Weiss v. Ins. Co.*, 148 Pa. 349, 23 Atl. 991, and *Roe v. Ins. Co.*, 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595, is more than sufficient, that where an insurer receives without objection notice of loss not complying with the exact requirements of the contract, either in form or in point of time, and refuses payment on grounds not involving the technical insufficiency of such notice, he is precluded thereafter from defending on that ground, being deemed to have waived it. Inasmuch as the relation of a common carrier to the shipper is practically that of an insurer, generally at common law, restrictedly under a limited contract, the same rule applies as regards similar requirements of notice, etc., in actions by the shipper against the carrier under such contract for loss or injury of goods shipped. *Merrill v. Express Co.*, 62 N. H. 514. And see *R. Co. v. Brown* (Ill.) 39 N. E. 273; *Hudson v. R. Co.* (Iowa) 60 N. W. 608; *Rice v. Ry. Co.*, 63 Mo. 314. The application of this principle to the undisputed facts in this case is too obvious to call for discussion.

“(6) The contention that the contract limiting the liability of defendant for injury, through negligence or other causes, to \$100 for each horse, the jury ought to have been told that that was the maximum of any possible recovery in the case, is answered by the principle, firmly established in this state, that there can be no valid limitation upon the liability of a common carrier for the results of its negligence. *R. Co. v. Schwarzenberger*, 45 Pa. 208, 215, 84 Am. Dec. 490; *Farnham v. R. Co.*, 55 Pa. 53, 58; *R. Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; *Willock v. R. Co.*, 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674; *Ruppel v. Ry. Co.*, 167 Pa. 166, 31 Atl. 478, 46 Am. St. Rep. 666; *Allam v. R. Co.*, 183 Pa. 174, 38 Atl. 709, 39 L. R. A. 535; *Crary v. R. Co.*, 203 Pa. 525, 528, 53 Atl. 363, 59 L. R. A. 815, 93 Am. St. Rep. 778. The allegation here was negligence in defendant, and injury resulting therefrom. That was the question submitted to the jury. Its verdict must be understood to declare negligence. Hence the limitation in the contract upon the amount recoverable was out of the case. And for this reason, if for no other, it would have been error to instruct the jury, as requested by defendant, that plaintiffs were bound by the terms of the contract.

“What has been said seems to cover all the points raised by the learned counsel for defendant in support of the rules for a new trial and for judgment non obstante veredicto. If the conclusions reached are correct, there is no room for sustaining either.

“The rules to show cause are discharged.”

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and ELKIN, JJ.

Cyrus G. Derr, for appellant.

Jefferson Snyder, of *Snyder & Zieber*, for appellees.

MESTREZAT, J. It was the duty of the defendant company not

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only to carry the plaintiffs' horses to the terminus of its road at Jersey City, but also to deliver them at that point to the connecting carrier in a car properly constructed, and suitable for the purpose of transporting them to their final destination. The failure to perform this duty is the basis of this action. The plaintiffs allege and the jury has found that the defendant company removed the horses from the Burton car at Jersey City, and placed them in a car not arranged and fitted, but utterly unsuitable, for the safe carriage of the horses. This was a clear violation of the carrier's common-law duty, and, the jury having found that this act of the defendant company resulted in the injury to the horses, the company's liability necessarily followed. The fact that the person employed by the shippers to accompany the stock was present when the horses were transferred to an unfit car, and assisted in making the change, did not relieve the company from the duty to furnish a suitable car. This person's duty, as provided in the contract, required him to load and to unload the stock; to feed, water, and care for it while in transit. He had no authority to select or furnish the car to which the stock was to be transferred at Jersey City. That was the duty of the carrier. The shippers had complied with their contract "to inspect the body of the car or cars in which said stock is to be transported, and to satisfy himself that they are sufficient and safe, and in proper order and condition," when they selected and had the defendant company procure for them the Burton car, in which they loaded the stock at Reading, and which admittedly was a safe and suitable car for carrying their horses. The company received the stock from the shippers in this car to be transported to its destination at Readville, a suburb of the city of Boston, Mass. If subsequently the car en route became unsuitable for the purpose of shipping the horses, or for any other reason it had to be abandoned, and the horses had to be transferred to another car, the selection and furnishing of a car suitable for transporting the stock to its destination devolved upon the carrier, and the failure to perform it would convict the company of negligence.

The defendant is not, under the facts of this case, in a position to insist upon the failure of the plaintiffs to deliver it a verified written claim of their loss within five days from the time the horses were removed from the car at their destination. The horses were shipped from Reading, Pa., on Wednesday, June 11, 1902, and arrived at the freight station of the connecting carrier at Readville, their destination, about 7:30 o'clock on Saturday evening, June 14th. They were in bad condition, and Mr. Cummings, one of the plaintiffs, refused to receive them until he was directed by the railroad agent at that point to remove them from the car and to hand in his bill for damages. Cummings immediately wired Eckert, joint owner of the stock, at Reading, the condition of the horses. On the following Monday, as Mr. Eckert testifies, he communicated with Mr. Fraim, the defendant

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company's freight agent at Reading, who had acted for the company in shipping the horses, "and told him that our horses had met with an accident, and we would hold the company responsible." Fraim replied that "he would report it to the proper authorities and let me know." On Wednesday, June 18th, Mr. Fraim wrote the defendant's claim agent at Philadelphia, advising him of the change of cars, of the detention of the stock at Jersey City, of the injured condition of the horses, and that the plaintiffs would doubtless claim damages. Accompanying and attached to this letter, was a statement of the billing, showing date of shipment, the number of horses shipped, and their destination. This letter was turned over to Mr. Baer, the defendant's live stock agent at Philadelphia, on June 20th. Under this date, Mr. Eckert, who was at Reading, also wrote Mr. Fraim, advising him fully as to the facts of the shipment, the transfer of the stock to an unfit car, its detention and bad treatment at Jersey City, and its condition on arriving at Readville, and inquiring whether the company was willing to take up the question of damages; stating the value of the horses to be about \$10,000. Mr. Fraim, in forwarding this letter on the same date to the company's claim agent at Philadelphia, said: "Please see my letter to you dated June 18, regarding this shipment explaining about the same as Mr. Eckert has done in his letter attached." On July 14th Mr. Baer wrote Mr. Eckert, in reply to his letter to Mr. Fraim, that "I cannot see that any damage would occur" by reason of the transfer of the horses to another car at Jersey City. It was not until the trial of the cause in November, 1903, nearly one year and a half after the plaintiffs' stock had been injured, that the company gave any intimation that it would resist the plaintiffs' demand for damages because a verified written claim of loss had not been delivered within five days from the time the horses were removed from the car at their destination.

It is true, as we have held, that a carrier may insert in its contract to transport his stock, a provision requiring notice of a claim for damages within a stipulated time, and such a provision is reasonable, and will be enforced. But, as said in *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. 302, 25 Atl. 1107: "It [the provision for notice of claim] is proper, because the demand, promptly made, gives warning, and enables the carrier, while evidence is attainable, and recollection is clear, to institute inquiry into the merits of the claim, and thus guard against fraud and over valuation." The purpose of the provision therefore, and the reason for its enforcement by the court, is to enable the carrier to make a prompt investigation of the merits of the claim, and thereby protect itself against imposition by the shipper. Being for the protection of the carrier, the latter may waive its right to enforce the provision. *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. 302, 25 Atl. 1107; *Hudson v. Northern Pacific R. Co.* (Iowa) 60 N. W. 608, 54 Am. St. Rep. 550; *Hinkle v. Southern Railway Co.* (N. C.) 36 S. E. 348, 78 Am. St. Rep.

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685. Here, as disclosed by the correspondence between the parties, the defendant company's agents were in possession of all the facts relative to the loss and the cause of it within five days of the delivery of the stock. This fact and the subsequent conduct of the defendant company were sufficient to go to the jury on the question of its waiver of the right to insist upon a formal written claim of the plaintiff's loss, and hence the court could not, as requested by the defendant, direct a verdict for the company on the ground that there had been no delivery of such a claim. It is settled, as the authorities cited by the trial judge show, that, for negligence by a common carrier in transporting goods intrusted to it, the shipper may, at his election, bring either an action *ex contractu* or an action *ex delicto*. It is also unquestionably the law of this state, as declared in numerous decisions of this court, that a common carrier cannot by contract limit its liability for the negligence of itself or its servants.

The able and exhaustive opinion of the learned trial judge, overruling the defendant's motion for a judgment *non obstante veredicto* and for a new trial, in which he considers all the questions raised on this appeal, renders any further consideration of the assignments of error unnecessary.

The judgment is affirmed.

ATLANTIC COAST LINE R. CO. *v.* WATKINS.

(Supreme Court of Appeals of Virginia, June 15, 1905.)

[51 S. E. Rep. 172.]

Railroads — Fires — Combustible Material on Right of Way.* — A railroad company owes the duty of keeping its right of way clear of combustible materials liable to ignition by sparks from engines.

Same—Due Care.† — Where a railroad company equips its locomotives with the best known appliances to prevent the escape of sparks, keeps the locomotives in good repair, and keeps its right of way clear of combustible materials, it is, as a general rule, not liable for fires caused by sparks from locomotives.

Appeal—Review—Questions of Fact. — Though an appellate court will not reverse the jury's finding on an issue of fact unless there has been a plain deviation from the evidence, nevertheless it will not hesitate to do so if satisfied that the evidence is plainly insufficient to support the findings.

Railroads—Fires—Evidence. — That a fire started from a spark from a locomotive does not alone justify an inference that the fire originated on the railroad right of way.

Same—Sufficiency of Evidence. — In an action against a railroad company for damages alleged to have been caused by a fire originating on the right of way, evidence held insufficient to justify submission to the jury of the question whether the fire did so originate.

*See foot-note appended to *Simpson v. Enfield Lumber Co.* (N. Car.), 9 R. R. R. 457, 32 Am. & Eng. R. Cas., N. S., 457, where all the preceding authorities in this series are collected.

†See foot-notes appended to *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 13 R. R. R. 836, 36 Am. & Eng. R. Cas., N. S., 836.

Atlantic Coast Line R. Co. v. Watkins

Error to Circuit Court, Chesterfield County.

Action by W. O. Watkins against the Atlantic Coast Line Railroad Company. There was judgment for plaintiff, and defendant brings error. Reversed.

George B. Elliott, for plaintiff in error.

J. M. Gregory and *S. C. Sands*, for defendant in error.

WHITTLE, J. This writ of error brings up for review a judgment in behalf of the defendant in error against the plaintiff in error in an action to recover damages for injury to the land and timber of the former, alleged to have been occasioned by fire which originated on the right of way of the plaintiff in error.

While it is conceded that the fire was caused by sparks emitted by one of the defendant's locomotives, it appears that the engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks. It also appears that the engine was in good repair, and in charge of a competent and experienced locomotive engineer. Therefore the defendant was not neglectful of any of its obligations to the public in those particulars. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799; *Pat-teson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *N. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

The remaining duty of a railroad company in that connection is to keep its right of way clear of combustible materials liable to ignition by sparks or coals of fire discharged from passing engines and to communicate fire to the property of others. *N. Y. P. & N. Ry. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Tutwiler v. C. & O. Ry. Co.*, 95 Va. 443, 28 S. E. 597. As a general rule, subject, of course, to exceptions in particular cases, where these responsibilities have been complied with, a railroad company fulfills its duty, and is not liable in damages for the escape of fire. *White v. N. Y. P. & N. Ry. Co.*, 99 Va. 357, 38 S. E. 180; *C. & O. Ry. Co. v. Heath* (Va.) 48 S. E. 508.

The specific ground of negligence relied on to sustain the verdict and judgment under review is the allegation that the fire originated in dry swamp grass on the defendant's right of way, and was communicated thence to the woodland of the plaintiff; and that is the sole question presented by the record for decision.

In approaching the consideration of that question, the court is mindful of the rule that the case is before it as upon a demurrer to the evidence, and that the inquiry touching the negligent starting or communication of the fire to the plaintiff's property involves an issue of fact for the determination of the jury, and that an appellate court may not reverse a judgment founded thereon unless there has been a plain deviation from the evidence. But the converse of the proposition is equally true—that the court will not hesitate to set aside the verdict if it is satisfied that the evidence is plainly insufficient to support it. *Kimbal & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *Reusens v. Lawson*,

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96 Va. 285, 31 S. E. 528; *Marshall's Adm'r v. Valley Ry. Co.*, 99 Va. 978, 34 S. E. 455; *Morien v. N., etc., Terminal Co. (Va.)* 46 S. E. 907; *Seaboard, etc., Ry. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392; *Moore Lime Co. v. Johnston's Adm'r (Va.)* 48 S. E. 557.

The burden of proof rests upon the plaintiff to show that the fire began on the right of way, for, unless that fact be established, the alleged negligence of the railroad company in suffering combustible matter to accumulate on its right of way was not the efficient and proximate cause of the accident.

Notwithstanding the evidence justifies the primary presumption that the fire started from a spark or coal of fire from the defendant's engine, it does not necessarily follow, and cannot be inferred from that circumstance alone, that it originated on the right of way. The case then presents two hypothesis of equal probability: The one, that the fire started on the right of way, in which event the railroad company would be liable; the other, that it started off the right of way, in which event the company would not be liable. It is incumbent on the plaintiff, therefore, in order to warrant a recovery, to establish the truth of the first hypothesis.

"It is * * * well settled that when damages are claimed for injuries inflicted through the alleged negligence of the defendant, not only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the injury may have resulted from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the damage was caused by the one as by the other." *C. & O. Ry. Co. v. Heath*, *supra*; *N. & W. Ry. Co. v. Poole's Adm'r*, 100 Va. 148, 40 S. E. 627; *Northington v. Ry. & Light Co.*, 102 Va. 446, 46 S. E. 475.

There is no direct evidence that the fire started on the right of way, and (independently of the positive evidence of the defendant that it started off the right of way) the circumstances tend to sustain the contrary theory.

The evidence on behalf of the plaintiff may be summarized as follows: On the morning of April 27, 1903, at about 11 o'clock, a short time after a passenger train had passed over the defendant's track, going from Petersburg to Richmond, the plaintiff discovered smoke rising in the woods in the direction of "Phillips' Crossing," on the railroad. The railroad is more than a mile from plaintiff's residence, and he paid no particular attention to the fire at that time; but afterward, about 3 o'clock in the afternoon, he observed that the wind, which was blowing from the direction of the railroad, was driving the fire towards his premises, and rode over to investigate it. Thereupon he ascertained that the burnt district terminated along an irregular course, extending some distance on the line of the railroad, and in several places three or four feet upon the right of way. A week later

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the plaintiff, accompanied by a witness, visited the scene of the fire, and determined the distance from the center of the track to the inner margin of the burnt area to be 30 feet, extending along a zigzag line for about 250 feet. The witness also stated, what is a matter of common observation, that a forest fire will "eat back against the wind"; and neither he nor the plaintiff could say at what point the fire started. The zigzag line referred to, if broken, might have indicated that fires were set out separately and independently of each other; but it was continuous, a circumstance which rather conduces to the theory that the fire crept back against the wind.

But, however that may have been, it was incumbent on the plaintiff to solve the doubt, for, as recently remarked by this court: "The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that, when liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, without a single known fact." *C. & O. v. Heath*, *supra*.

But the case does not depend entirely upon the plaintiff's evidence. The defendant introduced a witness who testified positively that he discovered the fire within a few minutes after the 11 o'clock train had passed "Phillips' Crossing," and it was burning two or three yards outside the right of way. It is true the plaintiff undertook to contradict this witness, but his alleged discrepancies of statement left unimpaired the explicit declaration that the fire started off the right of way.

It thus appears that the evidence, as a whole, is plainly insufficient to sustain the verdict, and the lower court erred in overruling the defendant's motion to set it aside, for which error its judgment must be reversed, and the case remanded for a new trial.

HOLMES *v.* CHICAGO, R. I. & P. Ry. Co.

(Supreme Court of Nebraska, April 5, 1905.)

[103 N. W. Rep. 77.]

Contributory Negligence—Exposure to Known Danger.*—By negligently or voluntarily exposing himself to known dangers, one does

*For the authorities in this series on the subject of contributory negligence and assumption of risks where a person exposes himself to a known danger, see *Lambert v. Southern Pac. R. Co.* (Cal.), 14

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not assume responsibility for others which are not known, and by the exercise of ordinary prudence would not be discovered.

Same.—From an examination of the record, the court is of opinion that the question of contributory negligence was improperly withdrawn from the jury.

(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Douglas County; Estelle, Judge.

Action by George Holmes, Jr., administrator of the estate of John E. Oakleaf, deceased, against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

George W. Cooper and *Martin Neilan*, for plaintiff in error.

Woolworth & McHugh, for defendant in error.

AMES, C. The facts out of which this case arose are stated fully and at length in a former opinion. *C., R. I. & P. Ry. Co. v. Holmes*, 94 N. W. 1007. The errors because of which the former judgment was reversed were avoided on the second trial; but there was additional evidence on the part of the company to the effect that at and long prior to the time of the happening of the accident it was and had been customary, in the yards which were the scene of the casualty, for the persons performing the particular services in which the deceased lost his life to cause the cars to separate from 30 to 60 feet before going between them. It is argued that the deceased knew of this custom, the observance of which was essential to the exercise of reasonable

R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575 (whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of a train or car which is seen by the traveler to be approaching before he makes the attempt); foot-note appended to *Roach v. Atlanta, etc., Ry. Co. (Ga.)*, 10 R. R. R. 97, 33 Am. & Eng. R. Cas., N. S., 97 (contributory negligence of deaf persons in walking on railroad tracks); foot-note appended to *Whitworth v. Shreveport, Belt Ry. Co. (La.)*, 12 R. R. R. 318, 35 Am. & Eng. R. Cas., N. S., 318 (incurring danger to save another); *Carver v. Minneapolis, etc., R. Co. (Iowa)*, 7 R. R. R. 70, 30 Am. & Eng. R. Cas., N. S., 70 (person standing in dangerous position assumed only such risks as he should have reasonably apprehended); *Schwanewede v. North Hudson County Ry. Co. (N. J.)*, 4 R. R. R. 191, 27 Am. & Eng. R. Cas., N. S., 191 (person cannot take chances and be free from contributory negligence); note, 5 Am. & Eng. R. Cas., N. S., 304 (obvious danger incurred at direction of servants of company); *Wherry v. Duluth, M. & N. Ry. Co. (Minn.)*, 4 Am. & Eng. R. Cas., N. S., 72 (incurring apparent and known danger); foot-note appended to *St. Louis & S. F. R. Co. v. Brock (Kan.)*, 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613 (incurring danger to avoid another peril); *Chicago, etc., R. Co. v. Winfrey (Neb.)*, 6 R. R. R. 689, 29 Am. & Eng. R. Cas., N. S., 689 (act of passenger committed under such circumstances as to render it obviously and necessarily perilous); for other passenger cases in this series on this subject see authorities on the contributory negligence of passengers in alighting from moving cars or trains, standing on platforms, boarding moving cars, passing from one car to another, and riding in dangerous places.

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care on his part, and that he had absolute command of the movements of the engine by which the cars might have been thus separated. but that nevertheless he went between them when by his own direction they were not separated more than 4 or 6 feet, knowing that the cars of the Union Pacific Company were liable to be put in motion by a slight jar, and to come together in consequence of their own gravity. Influenced by these considerations, the trial court instructed a verdict for the defendant on the sole ground that the deceased was guilty of contributory negligence. This instruction assumes, or, rather, is predicated upon, actionable negligence on the part of the defendant company, so that the sole question is whether the evidence discloses, without dispute, that the conduct of the deceased was such as to prove beyond reasonable controversy that he knew, or by the exercise of ordinary vigilance would have known, that the defendant was likely, negligently or otherwise, to give the cars of the Union Pacific such an impulse as would put them in motion, and, having that knowledge, was careless of his own safety from that danger.

In the present aspect of the case, it is immaterial what risks the deceased incurred from the cars and appliances of the Union Pacific Company, and the forces connected therewith, with which alone he had immediately to deal. It is admitted by the present state of the record that he did not come to his death by reason of the uninfluenced movement or operation of any of these things, and it is entirely clear that, if he had done so, the defendant would not have been liable in damages on account thereof. So that, after all, the real and sole questions ultimately to be decided in the case are, was the defendant guilty of negligence in "bumping" the cars of the Union Pacific Company? and was the deceased, in view of his knowledge, if he had knowledge, of the greater or less probability of such "bumping," guilty of negligently contributing to its consequences? Now, as to whether the defendant put the cars of the Union Pacific Company in motion by the impact of its own train before or after the crushing of the deceased, and as to whether, if it did so, the act was negligent on its part, and as to whether the happening of such an event was, or should have been, within the reasonable anticipation of the deceased, and as to whether, therefore, he omitted with respect to it the precautions of a reasonably prudent man, are all questions of fact, about which there is, in our opinion, sufficient conflict in the evidence to require them to be left to a jury. We are not called upon to investigate the relations of the deceased with his employer, or his duty towards the latter, nor the risks he assumed, negligently or otherwise in the conduct of its business. Yet, as it appears to us, these were the principal, if not the only, matters which the court had in mind in giving the instructions complained of, and to which the jury presumably supposed their attention was directed thereby.

We therefore recommend that the judgment of the district court be reversed, and a new trial granted.

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LETTON and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

HENRY v. NASHVILLE, C. & ST. L. RY.

(Supreme Court of Alabama, Jan. 17, 1905.)

[38 So. Rep. 361.]

Appeal—Review.—In the absence of a bill of exceptions on appeal, the granting of defendant's motion to strike the complaint cannot be considered.

Injury to Property—Cause of Action—Allowing Another Company to Use Defendant's Road.—A complaint in an action against a railroad company alleged that defendant had, by collusion with another company, allowed the latter to use defendant's road to grade a branch, whereby defendant aided the other company "to reach plaintiff's possession," which was taken by the latter company by force from plaintiff, and his crops destroyed. Held, that the complaint stated no cause of action.

Appeal from Circuit Court, Madison County; Osceola Kyle, Judge.

Action by James Henry against the Nashville, Chattanooga & St. Louis Railway. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The complaint, as originally filed, was as follows: "Plaintiff charges defendant collusion with Southern Railway Company, by allowing said Southern Railway Company to run over a branch in West Huntsville, belonging to defendant, and to put in a switch in said branch of defendant's run to Merrimack Cotton Mill, a branch to be graded by said Southern Railway Company, plaintiff further charges on the 9th day of June, 1899, and the privilege allowed said Southern Railway Company, by defendant to use defendant's road to grade said branch to said mill, added said Southern Railway Company to reach plaintiff's possession, which was taken by a strong force from plaintiff, by said Southern Railway Company, and cutting a fence around said possession, exposing the crop of watermelons and cantelopes on said possessions to stock and people during crop season in 1899, cutting drainage in crop, which caused great fall off in production, destroying flavor of mellons, destroying the entire crop, less ten dollars and fifteen cents. Said possession lying in Madison County, state of Alabama. Plaintiff ask in damages of defendant, fifteen hundred dollars. Plaintiff served notice in writing to attorney of defendant for possession." To this complaint the defendant demurred upon the grounds that it was frivolous, and that it stated no cause of action against the defendant. This demurrer was sustained. Thereupon the com-

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plaint was amended by adding another count. This amendment was, upon motion, stricken, but the record contains no bill of exceptions. The judgment entry recites that after the court struck the amended complaint the plaintiff declined to plead further, and judgment was rendered in favor of the defendant.

W. N. Benson, for appellant.

Oscar K. Hundley, for appellee.

DENSON, J. There is no bill of exceptions in this case; hence the first ground in the assignment of error, which challenges the correctness of the ruling of the court in granting defendant's motion to strike the amended complaint, cannot be considered. *Holley v. Coffe*, 123 Ala. 406, 26 South. 239; *Cottingham v. Greely Barnham Grocery Co.*, 123 Ala. 479, 26 South. 514; *Central of Georgia Ry. Co. v. Joseph*, 125 Ala. 313, 28 South. 35.

The original complaint does not state a substantial cause of action against defendant, and the second ground of demurrer was properly sustained to it.

The judgment of the lower court is affirmed.

Affirmed.

MCCLELLAN, C. J., and HARALSON and DOWDELL, JJ., concur.

ATLANTIC & B. RY. CO. *v.* J. B. SMITH & SON.

(Supreme Court of Georgia, June 16, 1905.)

[51 S. E. Rep. 341.]

Railroads — Killing Stock—Evidence—Negligence.*—The evidence for plaintiffs showed that the animal for the killing of which suit was brought was killed by the running and operation of the defendant's train, and the presumption arose that the defendant was negligent.

Same.—Some of the evidence offered by the defendant tended to show that its employees in charge of the train exercised due care to avoid the injury; but the engineer was not produced, and the evidence of the fireman, on account of the length of time intervening between the occurrence and the trial, was very uncertain, there being a failure on his part to recall with any degree of positiveness anything done by any member of the train crew to prevent the killing. From other witnesses there was some slight evidence tending to show that due diligence was not observed. The jury trying the issues of fact took this view of the evidence, the judge of the superior court, upon certiorari, sustained their finding, and this court will not reverse the judgment overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

*See foot-note appended to *Central of Georgia Ry. Co. v. Dich* (Ga.), 14 R. R. R. 200, 37 Am. & Eng. R. Cas., N. S., 200; foot-notes appended to *Airikainen v. Houghton County St. Ry. Co.* (Mich.), 14 R. R. R. 178, 37 Am. & Eng. R. Cas., N. S., 178.

Atlanta & W. P. R. Co. v. Hudson

Action by J. B. Smith & Son against the Atlantic & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Sweat and Haygood & Cutts, for plaintiff in error.

L. Kennedy, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

ATLANTA & W. P. R. Co. v. HUDSON.

(Supreme Court of Georgia, May 15, 1905.)

[51 S. E. Rep. 29.]

Negligence—Question for Jury.—Except where a particular act is declared to be negligence, either by statute or by a valid municipal ordinance, the question as to what acts do or do not constitute negligence is for determination by the jury, and it is error for the presiding judge to instruct them what ordinary care requires should be done in a particular case.

Trial—Instructions.—Language used by the Supreme Court in deciding a case before it, especially where used in discussing the facts of such case, is often inappropriate for use by the judge of a trial court in charging the jury.

Railroads—Killing Stock.*—In an action against a railroad company for the killing of cattle, it was error for the presiding judge to instruct the jury that if they should find, from the evidence, that the defendant "did use all the means at its command, after the cattle were discovered on the track, or so near thereto as the court has already charged you, and exercised all ordinary care and reasonable diligence to prevent the train from running over the cattle," the presumption arising from proof of killing the cattle would be rebutted. The requirement that the company should use "all the means at its command" was more stringent than the law provides.

(Syllabus by the Court.)

Error from City Court of La Grange; D. J. Gaffney, Judge pro hac.

Action by A. C. Hudson against the Atlantic & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hudson brought suit against the Atlantic & West Point Railroad Company, seeking to recover for the killing and injury of certain cattle alleged to have been struck by one of its trains. It is unnecessary to set out the evidence. The jury found for the plaintiff. The defendant moved for a new trial, and, upon its being denied, excepted.

*As to the care required of those in charge of railroad trains to avoid collisions with animals, see foot-notes appended to *Nashville & K. R. Co. v. Davis* (Tenn.), 13 R. R. R. 432, 36 Am. & Eng. R. Cas., N. S., 432.

As to the sufficiency of evidence to rebut the presumption of negligence arising from the fact of injury to live stock from collision with a train, see foot-note appended to *Central of Georgia Ry. Co. v. Dich* (Ga.), 14 R. R. R. 200, 37 Am. & Eng. R. Cas., N. S., 200.

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Dorsey, Brewster & Howell and *O. H. Thompson*, for plaintiff in error.

J. R. Terrell and *F. P. Longley*, for defendant in error.

LUMPKIN, J. (after stating the facts). 1, 2. Several charges of the court were alleged as error, on the ground that they undertook to instruct the jury what acts ordinary care required the employees of the company to do. In one instance he charged as follows: "You will look to all these questions under the evidence in this case to determine the truth of the same for yourselves, for the law imposes the duty on the railroad company to maintain a lookout to discover cattle on its track, to stop its train as soon as cattle appear upon its track, or in the act of approaching it, or so near to the same that a slight change of position by them would result in their destruction or injury." This was error. "In the trial of an action in a court of this state for a negligent tort, is it error for the court to tell the jury what facts do or do not constitute negligence, unless there is a statute or valid municipal ordinance which in terms or in effect declares the act referred to to be negligence." *Savannah, Florida & Western Ry. Co. v. Evans*, 115 Ga. 315, 316, 41 S. E. 631, 90 Am. St. Rep. 116.

That the Supreme Court may employ certain language in discussing a case, especially in regard to the facts under consideration, does not necessarily render such language proper for use by the judge of a trial court in charging a jury. A justice of the Supreme Court, in giving reasons for a judgment rendered, often uses argumentative language which would be wholly inappropriate for use in a charge by a judge of a trial court. There is no prohibition of law against an expression of opinion of the facts of the case by the Supreme Court. There is a direct prohibition as to an expression of such an opinion by a trial judge in his charge. Civ. Code 1895, § 4334. The presiding judge gave to the jury as propositions of law substantially certain statements which were made in opinions of this court in discussing the facts of cases then before it. *East Tenn. Railway Co. v. Burney*, 85 Ga. 636, 11 S. E. 1028; *Central of Ga. Ry. Co. v. Ross*, 107 Ga. 75, 32 S. E. 904; *Atlantic Coast Line R. Co. v. Williams*, 120 Ga. 1064, 1047, 48 S. E. 404. What was said in those decisions was in connection with the question whether the verdicts were sustained by the evidence and whether there was in fact evidence of negligence. The difference between such discussion and legal propositions suitable for a charge is obvious. The trial judge should not tell the jury what acts would constitute negligence and what would not, but should instruct them as to the proper measure of diligence and leave them to determine, in view of all the evidence bearing on the subject as to the time, place, circumstances, and happenings, and the whole transaction as disclosed by the evidence, as to whether there was or was not a want of due care. *Central of Ga. Ry. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430; *Calvin v. State*, 118 Ga. 73, 44 S. E. 848; *Savannah Ry. Co. v. Evans*,

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115 Ga. 315, 316, 41 S. E. 631, 90 Am. St. Rep. 116. There is no conflict between this ruling and that in *W. & A. R. Co. v. Burnham*, 50 S. E. 984. There is a wide difference between charging as to a duty imposed by law upon a carrier of passengers and telling the jury that it was the duty of the railroad to do certain specified acts to avoid injury to cattle along the road.

3. The measure of duty required of the employees of a railroad company in respect to stock along the line of its road is ordinary care. A charge which submitted to the jury to determine whether the defendant company "did use all the means at its command" declared too stringent a rule and was erroneous. See cases cited in *Hopkins on Personal Injuries*, §§ 121, 123.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

WILLIAMSON v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, June 15, 1905.)

[51 S. E. Rep. 195.]

Railroads—Action for Injuries—Evidence.*—In an action against a railroad for injuries, evidence examined, and held insufficient to show that plaintiff at the time of his injury was using the defendant's tracks as a walkway as an invited guest of the defendant or otherwise than as a bare licensee.

Same—Negligence.*—Where a railroad track has been used as a walkway by the public for many years, and such use is known to the railroad company and its employees, the sole duty of the company to persons whom it may reasonably expect to be on the track is discharged by the use of reasonable care to discover and avoid injuring them.

Same.†—A railroad is under no obligation to make preparation in advance for the protection of mere licensees in using its tracks for a walkway, and hence its failure to furnish a light on its engine on a dark night was not negligence as to a licensee using its tracks for a walkway.

Error to Law and Equity Court of City of Richmond.

Action by James E. Williamson against the Southern Railway Company. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

*As to who are licensees on railroad tracks, see foot-notes appended to *Booth v. Union Terminal Ry. Co.* (Iowa), 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768.

†As to the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; foot-notes appended to *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

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Meredith & Cocke, for plaintiff in error.

Munford, Hunton, Williams & Andersen, for defendant in error.

HARRISON, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The damages were assessed by the jury at \$1,500, subject to a demurrer to the evidence, which was sustained, and judgment given for the defendant.

The accident which is the subject of inquiry occurred upon that portion of the main line of the defendant which runs along the south bank of James river, at or about its entry of the company's yards in the city of Manchester. A little northwest of the city of Manchester, in James river, is an island called "Belle Isle," upon which is located an iron manufactory. This island is connected with the south bank, or Manchester side, of the river by a railroad bridge built by the defendant company for its use in hauling freight, upon each side of which is provided a sideway for the use of persons going to and from the ironworks. These ironworks and the railroad bridge connecting them with the main line of the Southern Railway on the Manchester side of the river have been in operation for many years. When the employees from Belle Isle cross the bridge and reach the south bank of the river, they have two routes open to them—one leading away from the railroad and into the city of Manchester, and the other along the right of way of the defendant company into the city. These employees had for many years used both routes, the choice depending upon the point of destination in the city. Those who, for their convenience, adopted the latter route, had always enjoyed its use by the passive acquiescence of the defendant.

The plaintiff had been for "three or four months" an employee of the ironworks on Belle Isle, and on the 27th day of November, 1903, he left the works 15 minutes before 6 o'clock to go to his home. When he reached the south bank of the river he pursued, as was his regular habit, the route along the right of way of the defendant company. He walked on the pathway at the side of the track a distance of about 1,400 feet, but, finding the path rough, he looked and listened to ascertain if a train was approaching, and, being satisfied that no train was coming, he stepped upon the railroad track and walked thereon for a distance of 25 yards, when he looked back and found a work train of the defendant company so close upon him that he could not jump out of the way in time to avoid the injuries complained of. The plaintiff says that it was a very dark night, that the engine was provided with no headlight or lights of any description, and when he looked back it was so dark that he could not see the engine good. He further says that his hearing was poor in one ear, and that it was downgrade at that point, which caused the train to run without making much noise.

It is contended by the plaintiff in error that when using the

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track and right of way of the railroad on the south side of the river as a convenient route to his home he occupied a higher relation to the defendant company than that of licensee, it being insisted that "the defendant so built its bridge with walkways on each side thereof that the workmen on Belle Isle could come across to the Manchester side, and use its tracks as their route to and from their homes; that no invitation in a practical way could have been more strongly given; that it is idle to say that the company only built the bridge to get the men to the shore, and that it never meant for them to use the tracks as their route home. The two things, the bridge and the route, were too closely connected for them to be separated with fairness. The old bridge and route had been used jointly for 50 years, and the new bridge and the route were intended and expected to be used jointly. The use was in fact by invitation."

We have been unable to find any fact or circumstance in the record to support this contention. No relation is disclosed between the defendant and the ironworks other than that of common carrier and shipper, and the defendant can hardly be held to have built its bridge from Belle Isle to the shore for the benefit of the workmen there employed. It was built for the use and the benefit of the railroad company in hauling freight. The construction of the walkways on each side of the bridge was a mere incident, and, while put there for persons to walk on, they served as a proclamation and warning to such persons not to use the track, rather than an invitation to use it. When those using the walkways on either side of the bridge reached the shore, they bore no relation whatever to the defendant company. They were uncontrolled and free to go where, when, and by whatever route they pleased. Such of them as chose to follow the right of way of the railroad as a convenient route to their homes did so voluntarily, and without invitation from the defendant company. On the contrary, 240 feet from where the plaintiff was struck there was a large sign 4 feet square, with the following warning thereon:

"Danger—Beware. The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians, who are warned to use the public streets and keep off these private tracks."

This warning is signed by the general manager of the defendant company. It is set up 10 feet high, and conspicuously in view of the plaintiff every time he passes over the right of way of the defendant in going to his home.

In the light of these facts, our conclusion is that the plaintiff was not using the railroad track on the evening of his injury as the "invited guest" of the defendant company, but was there as a bare licensee.

An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.

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In the case at bar the evidence shows that the right of way of the defendant company, at the point where the accident occurred, had been for many years in daily use as a walkway by persons from Belle Isle, and that this use and the particular hours of such use were well known to the company and its employees. Under these circumstances it was the duty of the company to use reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point. *Blankenship v. C. & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20; *C. & O. Ry. Co. v. Rodgers' Adm'x*, 100 Va. 324, 41 S. E. 732.

In the case of *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot, and was injured by a freight train that ran against the platform, this court said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings, and machinery on its cars, or of properly inspecting the same, or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed. The general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad—is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there"—citing 2 *Shear. & Red. on Neg.* § 705; *Nichol's Adm'r v. W. O., etc., R. Co.*, 83 Va. 102, 5 S. E. 171, 5 *Am. St. Rep.* 257; *Gillis v. Penn. R. R. Co.*, 59 Pa. 129, 98 *Am. Dec.* 317; *Holland, etc., v. Sparks*, 92 Ga. 753, 18 S. E. 990.

In the case of *C. & O. Ry. Co. v. Rodgers' Adm'x*, *supra*—a case similar in its facts and circumstances to that under consideration—this court approved an instruction which told the jury that the defendant company did not owe the plaintiff's intestate the duty of blowing its whistle, ringing its bell, running its engines at any particular rate of speed, or having a light on said engines or tender; that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant; but that if they believed from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care, under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff in time to avoid the accident, they must find for the plaintiff.

The result of these decisions is that a railroad company owes no duty of prevision to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty

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is to use reasonable care to discover, and not to injure, such persons when they may reasonably be expected to be on its tracks at a particular point. As said in Wood's Case, *supra*, such a person is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there. The uncontradicted evidence of the engineer in the present case is that he did keep a lookout, and did not see the plaintiff, who, he says, must have been walking in the middle of the track, where he could not have seen him on account of a curve in the road at that point; that, if the plaintiff had been on the side of the track at the edge of the ties, he could have seen him.

It is earnestly insisted that it was not intended, in the Rodgers Case, *supra*, to hold that a railroad company was without fault in running a train on a dark night with no light on its engine, thereby depriving itself of the power to keep such reasonable lookout as the law required; that the declaration in the Rodgers Case meant to charge that the failure to have proper lights on the engine was negligence in itself, without regard to whether or not they were necessary for the maintenance of a reasonable lookout; that the evidence bears out this view of the pleading, because it there appears that it was a bright moonlight night, and therefore immaterial whether or not there were lights on the engine; that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout, and at the same time to hold that it could so envelop itself in darkness as to prevent its performance of such clearly stated duty.

The argument of the learned counsel on this point may be reduced to this proposition: that if it is a bright moonlight night the railroad may run its trains without lights on its engines, but if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees, provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.

To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees; for, if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a downgrade—which it is here contended so reduced the noise of the train as to destroy its value as notice—the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employees should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensee. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad; but enough has been said to

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indicate how difficult, if not impossible, it would be to ingraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare licensees, and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected. This is shown by the instruction approved in the *Rodgers Case*, *supra*, which told the jury that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to have avoided the accident, they must find for the defendant.

In the case at bar the defendant discharged its duty to the plaintiff when it kept such reasonable lookout at the time as its servants could keep under the conditions then existing, among which conditions was an absence of the moon, and no artificial light provided to take its place. The darkness, which it is contended imposed upon the defendant the duty of providing lights for the protection of the plaintiff, also enveloped the latter when he stepped from a place of safety on the pathway to the defendant's track, and should have suggested to him the increased danger of his situation. Having reached the conclusion, however, that the defendant company has failed in the performance of no legal duty that it owed the plaintiff, it is not necessary to consider the negligence of the latter.

For these reasons the judgment complained of must be affirmed.

BRAMMER'S ADM'R v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia, June 15, 1905.)

[51 S. E. Rep. 211.]

Railroads — Crossings — Travelers—Care Required.*—A public railroad crossing is of itself a proclamation of danger, requiring a person about to cross to use both his eyes and ears to ascertain the approach of a train.

*See foot-note appended to *Louisville & N. R. Co. v. Bryant* (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734; foot-note appended to *Louisville & N. R. Co. v. Satterwhite* (Tenn.), 12 R. R. R. 296, 35 Am. & Eng. R. Cas., N. S., 296.

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Same — Death — Contributory Negligence — Failure to Look and Listen—Proximate Cause.†—Where plaintiff's intestate drove a covered wagon onto a railroad crossing without looking or listening for the approach of a train which was plainly visible for a distance of from 280 to 300 yards when intestate was within 20 or 25 feet of the track, deceased's contributory negligence, and not the failure of the train crew to give signals, was the proximate cause of the accident.

Same—Acts of Servants—Negligence.—The act of a railroad fireman in "hooking" his fire as the engine emerged from a cut and approached a railroad crossing, which act was in the regular line of his duty, and temporarily prevented him from viewing the crossing, was not negligence.

Same—Last Clear Chance—Evidence.—Where deceased approached a railroad crossing at which he was killed from the side opposite to that on which the engineer sat, and the latter had no knowledge of deceased's peril until informed by the fireman, who did so as soon as, in the exercise of ordinary care, he could have ascertained the same, after which the engineer did everything possible to prevent a collision, defendant was not liable notwithstanding deceased's contributory negligence in going on the crossing.

Appeal from Circuit Court, Henry County.

Action by Brammer's administrator against the Norfolk & Western Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel A. Anderson, for appellant.

Henry G. Mullins and Wm. Gordon Robertson, for appellee.

KEITH, P. The accident by which plaintiff's intestate, M. L. Brammer, came to his death, occurred upon the track of the Norfolk & Western Railroad at the crossing of a public road a few miles west of Martinsville. Near the crossing is a small bluff, on the right hand of a traveler approaching the railroad from Smith's river. For a short distance this bluff cuts off a view of the railroad from a person going in the direction of Martinsville, and an engine coming from Martinsville is not visible to a person standing on the crossing until it comes out of a cut to the south, or east of south. As soon as it leaves the cut the engine is visible for the entire intervening distance. A man standing in the county road, or sitting in a vehicle in the road, 23 feet from the crossing, can see 800 feet towards the cut. At

†For the authorities in this series as to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; see foot-note appended to *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, etc., R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison, etc., R. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

As to the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Birmingham Ry., L. & P. Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165.

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20 feet from the crossing he can see 900 feet in that direction. At the cut there is a sharp curve, and a person walking in the road towards the railroad track can see an engine coming out of the cut towards him before he reaches the bluff. Approaching the railroad, he comes in plain view of the track up to the mouth of the cut. The farthest point from the track at which a view of the cut is relieved from the obstruction of the bluff is fixed by the testimony at 23 feet. Between this point and the track the view of the cut is entirely unobstructed.

On the evening of the accident, M. L. Brammer, a man in the possession of all of his faculties of sight and hearing, was approaching this crossing about 6 o'clock. There was nothing in the surroundings, save the bluff, to interrupt or to interfere with the full exercise of his senses either of sight or hearing. He was driving a two-horse covered wagon. The wagon sheet, according to the impression of one witness, was turned up a little on the sides. Whether it was turned up sufficiently to enable a person sitting in the wagon to see to the right or the left is not stated. When seen by the witness Brown, Brammer was sitting in the front of the wagon; but later, at the crossing, at the time of the accident, he was not visible to other witnesses. According to one witness, who saw the collision, and at the time was about 15 feet above the crossing, as the wagon approached the railroad no driver was visible. Her language is: "I saw a wagon coming, but did not see anybody driving. I saw it when it struck it." She could see into the front of the wagon, but could see no one at all, and did not see Brammer until he was knocked out by the collision. Another witness was in 15 steps of the wagon when the accident happened. He saw no one driving it. He was coming along behind the wagon, and, as a matter of course, did not enjoy the same advantage of position for seeing the driver of the wagon as did one standing in front of it. It was plain that the driver of the wagon was either sitting far back in his wagon or was lying down. Wherever he may have been, he was not sitting on the front end of his wagon, where he would be visible to observers, and best able to take such notice of his surroundings as would enable him to take proper precautions for his own safety. Approaching the crossing, Brammer did not stop. The witness who was following the wagon says that when he heard the whistle of the engine blow he thought "the wagon would stop right there for the train to pass, and he would overtake it, but he did not make any check at all, but kept straight on" and in a minute after the whistle blew the engine came out of the cut. The witness "still thought that the driver would see the engine and stop, but he did not make any stop at all. He just kept right on."

It is clearly shown by the evidence that if Brammer had been looking he could have seen the engine at a distance of 280 or 300 yards when he was within 20 or 25 feet of the track. There is positive evidence that the engineer blew the whistle for the cross-

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ing. There is much negative evidence that it was not blown. We will not undertake to determine this question, but will, for the purpose of this case, assume that it was not blown, and that in the failure to blow it the railroad company was guilty of negligence.

There is evidence to show that the engine, to which no cars were attached, was running down grade by force of gravity, at a rapid rate of speed. There is no evidence, however, to show that its speed was such as to constitute negligence per se. The only negligence of which the railroad company may be said to have been guilty consists in its failure to sound the whistle, as we have assumed to be the case.

But this negligence was not the proximate cause of the injury, because it was none the less the duty of Brammer, upon approaching the railroad, to look and listen—to take precautions, in other words, for his own safety—and, if he had done so, there is no doubt that he would both have heard and seen the engine in time to stop, and thereby have avoided the accident. The real question upon which this case turns is, the plaintiff himself being negligent in his approach to the railroad, could the defendant, by the exercise of ordinary care after his danger was known, or ought to have been known, have avoided the consequences of that negligence?

After the evidence was all submitted to the jury, the defendant demurred; and, the jury having found a verdict subject to the demurrer to the evidence, the circuit court entered judgment for the defendant. The case is therefore before us upon a well-recognized rule of law, which has been stated so frequently that it is unnecessary now to do more than advert to it. Considered in obedience to that rule, we are of opinion that the judgment of the circuit court is plainly right.

It may be well to cite some authorities as bearing upon the reciprocal duties of the traveler and the railroad company at a public crossing:

In the case of *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238, it is said that, if the death was caused solely by the negligence of the defendant, there can be no doubt of the right of the plaintiff to recover damages therefor. If, however, the proximate cause of death was his own negligence, concurring with the negligence of the defendant, there can be no recovery. And further, that "by the use of his faculties Johnson could have clearly seen the train as it approached the crossing, and the engineer could have seen him for the same distance after he came within 15 or 20 feet of the track, if they were at their posts and performing their duties." The negligence of the employees of the defendant was no excuse for negligence on the part of the plaintiff. The day was clear and still. His sight was unimpaired. He could hear the rumbling of the train. There were reciprocal duties imposed upon him. He could not go on the railroad, even at a public crossing, without exercising ordinary

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care and caution. The track was a proclamation of danger. It was his duty, before going on it, to use both eyes and ears. He should have listened and looked in either direction from which a train could come. If he had done so, he could not have failed to hear and see the approaching train, and be made sensible of the danger of going on the track. It was in plain view. If he failed to look and listen as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he could get across, and was killed, his own act—his own negligence—so contributed to the injury that a recovery therefor cannot be sustained.

These remarks are applicable to the facts of the case under consideration, and are supported by a line of decisions. See *Lacy's Case*, 94 Va. 475, 26 S. E. 834.

In *Martin v. R., F. & P. R. Co.*, 101 Va. 406, 44 S. E. 695, the rule is stated as follows: "A plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such cases, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'"

It is true, however, that "a defendant company may be liable for injury inflicted on the plaintiff, notwithstanding the latter's contributory negligence, if by the exercise of reasonable care it could have discovered and avoided the injury." *Rogers' Case*, 100 Va. 325, 41 S. E. 732; *Joyner's Case*, 92 Va. 354, 23 S. E. 773.

"If at a public crossing where a party is injured by a railroad train the agents in charge of such moving train saw the party in a position of danger, or by the use of diligence might have seen him, and failed to exercise proper care and due diligence to stop the train and prevent it from striking him, it is liable." *Few's Case*, 94 Va. 82, 26 S. E. 406.

This principle is well established, and needs no further citation of authority.

Coming now to the facts as bearing upon this aspect of the case, it is true that, while Brammer could see the engine, the trainmen could likewise have seen Brammer. They saw the driver of a wagon approaching the track. The trainmen had a right to assume that Brammer would, in the discharge of his duty, take reasonable precautions for his own safety; that he would approach the railroad with his team under control (*Lacy's Case*, *supra*); and that he would look and listen before undertaking to cross the track. It was only after it came to the knowl-

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edge of the trainmen, or, by the exercise of ordinary diligence in the performance of duty upon their part, should have come to their knowledge, that Brammer, disregarding his duty and oblivious of his danger, was in a position of danger, that the duty devolved upon the agents of the company to stop the train.

It appears that as the engine emerged from the cut the fireman was engaged in "hooking" his fire. This was in the regular line of his duty, and it cannot be considered an act of negligence. *L. & N. R. Co. v. Creighton* (Ky.) 50 S. W. 227. As soon as the fireman had performed the duty about which he was engaged, he looked up, and saw the wagon approaching the crossing. He called to the engineer, who put on his emergency brake at once. The fireman saw no driver, and in this respect corroborates the testimony of other witnesses, who were near the scene of the accident, but saw no driver until he was thrown from the wagon by the force of the collision. When the fireman saw the horses, their feet were just about on the track, and they were in a fast walk. The engineman saw no one until the fireman called out, and his testimony is that he did all that he could to stop the engine; that his eye was on the track all the way from the cut; that there was a steep down grade to the crossing, and he could not see any one coming from the left on account of a curvature in the track; that the engine was running without steam, and by gravity alone.

To sum up the case briefly, it appears that the railroad company was guilty of negligence in failing to sound its whistle, but that this omission was not the proximate cause of the accident, since the plaintiff in error's intestate, had he taken the precautions which the law imposed upon him, could have heard and seen the approaching train. In other words, the evidence establishes beyond doubt that Brammer was guilty of contributory negligence. Considering the case from that point, it then became incumbent upon the plaintiff in error to show that after the position of danger in which the contributory negligence of Brammer had placed him was known to the defendant in error, or, in the exercise of reasonable diligence in the performance of its duties, should have been known to it, it omitted to do something which might have saved him from the consequences of his own imprudence. The evidence wholly fails to prove any such omission.

In what we have said we have attempted little more than to abridge the very excellent opinion of the circuit judge, but we think we have said enough to show that there is no error in the judgment complained of, which is affirmed.

HENDRICKS v. SOUTHERN RY. CO.

(Supreme Court of Georgia, June 15, 1905.)

[51 S. E. Rep. 415.]

New Trial—Grounds.—An action for damages was brought against a railway company on the ground that a house located near the railroad track was set on fire by sparks negligently emitted from an engine pulling one of the defendant's trains. A verdict was rendered in favor of the plaintiff, and, on motion, a new trial granted. On a second trial a verdict was again rendered for the plaintiff for a slightly smaller sum. A second motion for new trial was made, and, upon the hearing before a different judge from the one who presided at the trial, it was granted. The motion contains no grounds assigning error in rulings of the court which would authorize a new trial, and the evidence was sufficient to sustain the verdict. Held, that the verdict should have been allowed to stand, and the grant of a second new trial was error.

Will—Construction—Injury to Estate—Action by Executor.—The will of a married woman named her husband as executor, "with full and ample power to take charge of her entire property, personal and real, to manage it as in his discretion seemed best to him, to sell and convey and reinvest the proceeds of any sale made in both personalty and realty as he deemed best; and all sales of both personal and real property to be solely in the discretion of her said executor at private or public sale, or in such manner and on such terms as he saw fit to adopt relative to any and all her property without any order from the court of Ordinary for such sale or reinvestment. That her said executor was to be left in the management of her said estate to his own discretion, and should not be compelled to make returns of his acts and doings in the premises, she reposing entire confidence in his judgment and discretion to manage the property for the best interest of his and her children without any interference by the court or orders and directions therefrom; she therefore gave him power to manage without restrictions all her said property, leaving it with him when and where to divide it out among their children, or to keep it together as long as he lived, or until the youngest child became of age, before any division thereof; or to make division earlier or at any time that he saw fit and in the manner that he thought best; that her said executor should not be made to account for the management or disposition of her property or the proceeds thereof, but should have absolute and untrammelled control of her entire estate during his life without liability therefor; and at his death the estate then in his hands should be divided equally between his children, share and share alike; but should the said executor make any advances to any child during his or her life as part of his or her said child's distributive share in the estate of testator, then such advances so made shall be accounted for by such child in the distribution among the children of testator." Held, that this provision did not vest the legal estate at once in the husband individually. The executor had the right to keep the estate intact and manage it, at least until the youngest child became of age, and, for the negligent destruction of property forming a part of such estate during that time, he could sue as executor.

Fires Set by Locomotive—Evidence.*—On the trial of an action

*See foot-notes appended to *Norfolk & W. Ry. Co. v. Briggs* (Va.), 13 R. R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201; foot-note appended to *Louisville & N. R. Co. v. Fort* (Tenn.), 12 R. R. R. 276, 35 Am.

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based on the contention that property was negligently set on fire by sparks emitted by a railroad engine, it being in controversy whether the engine was properly equipped and handled, evidence tending to show that on that day, and near the time of the alleged burning, the same engine threw out sparks and cinders which set fire to grass along the right of way of the railroad at two different points, was admissible.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; D. M. Roberts, Judge.

Action by T. R. Hendricks, executor, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. & Warren Grice, for plaintiff in error.

De Lacy & Bishop, for defendant in error.

LUMPKIN, J. T. R. Hendricks, as executor of his deceased wife, brought suit against the Southern Railway Company to recover damages for the burning of a house and contents located near the right of way of the railway, and which, it was alleged, was set on fire by sparks or cinders carelessly thrown from one of its engines. The defendant denied the allegations of the declaration that the fire was caused by its engine, and that there was negligence on its part. Two verdicts were found in favor of the plaintiff. A second motion for new trial was made, containing 14 grounds. But we think that none of them authorized the verdict to be set aside. Among these grounds was one complaining that the court held that under the will of Mrs. Hendricks, the substance of which is set out in the second headnote, the executory had the right to keep the estate intact until the youngest child became of age, and that the executor consequently had the right to sue for an injury to the property resulting from a negligent tort. In this we think he was right.

There was conflict in the evidence as to whether the fire was the result of sparks or cinders thrown off by the defendant's engine. A witness testified that when the engine, which it is claimed emitted sparks, passed a place about $4\frac{1}{2}$ miles from the place of the burning, it was throwing out sparks which set fire to the grass along the right of way. Another witness testified to a similar state of facts at a place about five miles from the point where the plaintiff's house was burned. The latter witness stated that he saw grass on fire about 75 or 80 feet from the railroad, and that it began to burn as soon as the train passed. A third witness testified that the engine emitted cinders and sparks as large as a man's thumb, and in considerable quantities;

& Eng. R. Cas., N. S., 276; foot-note appended to *Olmstead v. Oregon Short Line R. Co.* (Utah), 12 R. R. R. 261, 35 Am. & Eng. R. Cas., N. S., 261; *Louisville & N. R. Co. v. Short* (Tenn.), 12 R. R. R. 57, 35 Am. & Eng. R. Cas., N. S., 57; foot-note appended to *Alabama & V. Ry. Co. v. Ætna Ins. Co.* (Miss.), 12 R. R. R. 52, 35 Am. & Eng. R. Cas., N. S., 52.

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that they remained red-hot until they fell to the ground and set the grass along the right of way on fire. Evidence was introduced on behalf of the defendant to show that the engine was properly equipped with a spark arrester which was in good condition. Its boiler inspector testified that the meshes or holes in the netting on this locomotive were three-sixteenths of an inch in size, that if smaller holes were used it would clog the engine and prevent the necessary draft, and that if the netting was all right nothing larger could pass through. On cross-examination he testified that a spark larger than a pencil could not pass through the spark arrester, and that "if an engine had thrown out sparks larger than that cedar pencil, and thrown them from 60 to 80 feet, and they stayed alive until they got on the ground, such an engine could not have been equipped with a first-class spark arrester." The plaintiff did not, therefore, rely upon a mere presumption arising from proof of injury, but introduced additional evidence bearing on the question of negligence. It was not only admissible; it was very material. A careful examination of the record discloses no reason why this second verdict should have been set aside. See *Brown v. Benson*, Rec., 101 Ga. 753, 29 S. E. 215; *Central of Ga. Ry. Co. v. Trammell & McCowen*, 114 Ga. 312, 40 S. E. 259.

Judgment reversed.

SIMMONS, C. J., absent. EVANS, J., disqualified.

INTERNATIONAL & G. N. RY. CO. v. McVEY *et al.*

(Supreme Court of Texas, May 18, 1905.)

[87 S. W. Rep. 328.]

Wrongful Death—Action by Minor for Death of Parent—Damages—Loss of Parent's Care—Education.*—Under Rev. St. 1895, art. 3027, giving a recovery for injuries resulting from death, and authorizing the jury to award such damages as they may think proportioned to the injuries sustained, the damages recoverable are such pecuniary benefits, by which is meant everything that can be valued in money, including, in case of a minor child suing for the death of a parent,

*For the authorities in this series on the subject of the elements of damages recoverable for the death of a parent, see *St. Louis, etc., R. Co. v. Robertson* (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78 (elements of damages for death of father); *Ft. Worth, etc., Ry. Co. v. Sivells* (Tex.), 3 R. R. R. 927, 26 Am. & Eng. R. Cas., N. S., 927; *Illinois Central R. Co. v. Clarkson* (Tenn.), 5 R. R. R. 459, 28 Am. & Eng. R. Cas., N. S., 459 (measure of damages for death of husband and father); note, 11 Am. & Eng. R. Cas., N. S., 750 (elements of damages for death of husband and parent); *Stahler v. Philadelphia & R. Ry. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 815 (right of adult children to recover damages for negligent killing of their father, who made them a yearly allowance, is not affected by the fact that they inherited his estate); *Chicago & W. I. R. Co. v. Ptacek* (Ill.), 10 Am. & Eng. R. Cas., N. S., 481 (benefit accruing to adult

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the reasonable value of such nurture, care, and education as the child would have received from the parent, as plaintiffs had a reasonable expectation of receiving from deceased had he lived, and do not include sorrow for the death of deceased, nor the loss of his society.

Same—Same—Same—Instruction.—Under Rev. St. 1895, art. 3027, giving a recovery for injuries resulting from death, and authorizing the jury to award such damages as they may think proportioned to the injuries sustained, a charge authorizing a recovery of such sum as would fully compensate plaintiffs for the actual damages sustained by them, and telling the jury not to allow anything by way of solace for the death of deceased, or for any sorrow or anguish suffered by them as a result of such death, is misleading, in that it expressly excludes the improper element of damages sorrow and anguish, and does not also exclude the other improper element loss of society.

Injury to Employee—Notice of Train's Approach—Sufficiency of Evidence.—In an action for the death of a section foreman struck by a train, testimony that before he was struck deceased gave a command to hurry up certain work, and stated that the train was coming, does not conclusively show that he had heard or seen the train, and was aware of its immediate approach, but what he meant by the remark was a question for the jury.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Mrs. Margaret McVey and others against the International & Great Northern Railway Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiffs (81 S. W. 991, 83 S. W. 34), and defendant brings error. Reversed.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for plaintiff in error.

Will G. Barber and A. B. Storey, for defendants in error.

GAINES, C. J. Margaret McVey brought this suit in her own behalf and for the benefit of her minor children to recover of the plaintiff in error damages for the death of her husband, who was also the father of the children. His death was alleged to have been caused by the negligence of the servants of the defendant corporation. She recovered a judgment in the trial court for herself and the other beneficiaries of the action, which judgment was affirmed upon appeal.

We are of opinion that the judgment should be reversed, and the cause remanded for error in the charge of the court as to the measure of damages; and, since the other questions were correctly disposed of in the able and elaborate opinion of Chief Jus-

children from decedent's life); *Felton v. Spiro* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 865 (damages for benefit of decedent's children); *Tyler S. E. Ry. Co. v. Raspberry* (Tex.), 3 Am. & Eng. R. Cas., N. S., 376 (damages recoverable by a minor for his father's death); *St. Louis & S. F. Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123 (loss of moral and intellectual training in action for death of father, in absence of evidence that he was a fit person to train child); *Chicago & E. R. Co. v. Thomas* (Ind.), 21 Am. & Eng. R. Cas., N. S., 343 (presumption that damages were sustained, in action for death of husband and father).

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tice Fisher, it would be a profitless task to state the case in full, or to discuss the questions of which a correct disposition has been made by the Court of Civil Appeals. We shall therefore in the main confine our remarks to a discussion of the question of the correctness of the instruction of which mention has just been made. The deceased was a section foreman, working for a salary of \$50 per month, and was at the time of his death 52 years of age, with a life expectancy of a little more than 19 years. When he returned home from work, he assisted his wife in the performance of her household duties. The verdict of the jury awarded a recovery in the aggregate of \$20,000, apportioned \$8,000 to the widow and \$4,000 to each of the three children. The charge under consideration is as follows: "If you find from the evidence and under the charges of the court for the plaintiffs, you will assess their recovery of damage at such amount, if paid now, fully compensate them for the actual damages, if any, sustained by them, as shown by the evidence, and such as is fairly proportioned to the injury sustained, if any; but you will not allow the plaintiffs anything by way of solace for the death of said Edward McVey, or for any sorrow or anguish suffered by them as a result of such death." Our statute which gives a right of recovery for injuries resulting in death provides, among other things, that "the jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." Rev. St. 1895, art. 3027. There could hardly be a statute more vague in its terms than this. It is, however, settled by our decisions, that the damages which may be recovered under the statute are such pecuniary benefits as the plaintiff had a reasonable expectation of receiving from the deceased had he lived. *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519. By pecuniary benefits is meant not only money, but everything than can be valued in money, and includes, in case of a minor child who is suing for the death of a parent, the reasonable value of such nurture, care, and education as the child would have received from the deceased parent had such parent lived. But neither sorrow for the death of the deceased relative (*Houston City R. R. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31) nor the loss of his or her society (*T. B. & H. R. R. Co. v. Warner*, 84 Tex. 122, 19 S. W. 449, 20 S. W. 823) are recoverable in such cases. Now, we think it apparent that in the absence of some instructions, in a charge of this character, as to the damages which were to be estimated and as to those which were to be excluded, a jury would be likely to give compensation both for the grief and the loss of society caused by the death. In the case of the *Galveston, Harrisburg & San Antonio Railway Company v. Worthy*, 87 Tex. 459, 29 S. W. 376, the trial court charged the jury upon the measure of damages as follows: "In case you

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find for plaintiffs, you may give them such damages as you may think proportioned to the injury resulting to plaintiffs from the death of H. C. Worthy," etc. This charge was held to be erroneous, not for the reason that it directly announced any incorrect proposition of law, but because it did not go further, and instruct the jury that it was only pecuniary damages which could be allowed; that is to say, as we understand, only compensation for pecuniary loss, or the loss of something the value of which is ordinarily capable of being estimated in money. The instruction in this case does not, as that in *Railway Company v. Worthy*, supra, stop with telling the jury that they "may give such damages as they may think proportioned to the injury," but goes further, and instructs them not to allow anything "by way of solace," or for "any sorrow or anguish suffered by them as a result of" the death. This instruction, as we construe it, means merely to exclude a recovery by the plaintiffs of any compensation for the grief caused by the death of the husband and father. It does not exclude compensation for the loss of the society of companionship of the deceased, which, in the opinion of some, if not all, of the jurors, may have constituted the most serious injury to the wife at least. Such being the case, to exclude one improper element of the damages and not to exclude another tends rather to aggravate than to alleviate the tendency of the charge to mislead. "The mention of one thing is the exclusion of another," is a rule in the construction of written instruments. It is no less a rule of common sense, and one which suggests itself to the ordinary mind, when construing language, either written or spoken, to which it is applicable. For example, let us suppose that during the deliberation of the jury in this case a suggestion had been made as to giving compensation for the grief of the plaintiffs on account of the death of their relative, the answer would have been that the court had instructed the jury not to give damages on that account. Had the loss of society next been suggested, the answer would have been as ready and as conclusive that the court had not excluded that matter by its charge, and therefore the jury should consider and include damages, if any, on that score. We are of opinion, therefore, that the instruction under consideration was misleading; and we think also, by reason of its lack of proper limitations as to the elements of damages which the plaintiffs were entitled to recover, it probably led to the verdict in the case—a verdict seemingly excessive in amount, and certainly, under all the circumstances of the case, unprecedentedly large.

When we granted the writ of error we were inclined to think that the court erred in refusing to give the third special instruction asked by the plaintiff in error, and we now think that if, as claimed by plaintiff in error, "it appeared by the uncontroverted evidence that Edward McVey * * * knew of the approach of defendant's train to the place of collision with the push car," the charge should have been given. But the only testimony upon

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the point tending to show his knowledge, so far as has been pointed out to us, was that of Isam Tisdale. He was the only person who was with McVey at the time of the accident and who testified upon the trial. His testimony which tended to show McVey's knowledge of the approach of the train was that "McVey gave a command to hurry up, and get the ties off the push car. He said the train was coming." It does not necessarily follow from this that McVey, either by having seen or heard the train, was aware of its immediate approach. He knew that the train was due there, and would in all probability pass very soon; and he may have relied upon the sound of the whistle at the whistling post to give him warning in time to clear the track. What he meant by the remark was a matter for the determination of the jury.

The question of the excessiveness of the verdict and of our power to reverse the judgment on that ground need not be decided upon the determination of this writ of error.

For the error pointed out, the judgment is reversed, and the cause remanded.

OMAHA ST. RY. CO. v. MATHIESEN.

(Supreme Court of Nebraska, May 17, 1905.)

[103 N. W. Rep. 666.]

Accident at Crossing — Contributory Negligence — Attempting to Drive Over Tracks in Front of Approaching Street Car.*—If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it.

Evidence.—The exclusion of testimony to show that the car might have been seen at a greater distance is not erroneous, since the question was not whether the plaintiff might not have seen the car at a greater distance, but whether he was guilty of negligence in attempting to cross with the car at the distance it actually was when he saw it.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Douglas County; Redick, Judge.

Action by Nels Mathiesen against the Omaha Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*As to whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of train or car which is seen by the traveler to be approaching before he makes the attempt, see foot-notes appended to *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

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John L. Webster and *W. J. Connell*, for plaintiff in error.

Weaver & Giller and *Frank T. Ransom*, for defendant in error.

LETTON, C. The facts in this case are set forth in the opinion by Mr. Commissioner Ames in *Mathieson v. Omaha Street Railway Co.* (Neb.) 92 N. W. 639. At that time the judgment of the district court at a former trial was affirmed. Upon a rehearing, 97 N. W. 243, the judgment was reversed, and a new trial ordered. At the new trial a verdict and judgment were rendered against the defendant, from which it prosecutes error.

At the former hearing before this court its attention was directed to the question whether or not the evidence on the part of the plaintiff was sufficient to warrant the court in giving a peremptory instruction for the defendant at the close of the plaintiff's case, and it was held error to so direct. At the last trial evidence was introduced by the defendant as to the speed of the car which was not produced at the former trial, and it is now contended that, taking all the evidence together, it is not shown that the defendant was guilty of actionable negligence. There is a conflict in the evidence with reference to the rate of speed at which the car was running. It was held upon the rehearing that there was sufficient evidence given by the plaintiff himself at the former trial to render it necessary to submit the question as to whether or not the defendant was operating its car at a negligent rate of speed to the jury, and the fact that the defendant has produced additional evidence upon its side of the controversy, while the plaintiff's testimony is substantially the same as on the former trial, does not change the effect of this adjudication. This is the law of the case, and will not be re-examined.

The principal ground upon which the defendant now seeks to reverse the judgment of the district court is that the evidence shows that the plaintiff was guilty of contributory negligence. It appears that Leavenworth street, from Twenty-First street to Twentieth street, has a down grade of 3 per cent. It seems that it is 17 feet from the south curb of Leavenworth street at Twentieth street to the south rail of the street railway track; that the plaintiff was driving north upon Twentieth street at a rate of between three and four miles an hour. He testifies that he looked east and saw no car, then looked west and saw the headlight of a car opposite where he knew certain flats to be, a distance of about 200 feet; that he immediately whipped up his horse in order to get across the track, but that the car struck the wheel of his wagon before he cleared the track. The question, then, is presented whether or not he was guilty of contributory negligence in attempting to drive across the tracks at a time when his horses' feet were at the track, and when he saw a street car at a distance apparently of from 150 to 200 feet. He testifies that his wagon and horses were 18 feet 4 inches long; con-

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sequently, in order to clear the track, he would have been compelled to move forward more than that distance. The ordinances of the city of Omaha prohibit the street car company from operating its cars at a speed greater than 15 miles an hour, and the testimony on the part of the defendant is that the usual running speed is from 8 to 10 miles an hour, and that this was the speed of this car. If the street car had been distant 150 feet at the time Mathiesen first saw the car and his horses reached the railway track, his team, traveling at the rate of 3 miles an hour, would have moved forward 45 feet while the street car was traversing the 150 feet at the rate of 10 miles per hour; while, if the car was moving at the rate of 8 miles per hour, he would have moved a distance of 56 feet while the car was traversing this distance. Even if the car had been running at the highest rate of speed permitted under the ordinance, and he had not urged his team forward with increased speed, he would have moved forward 30 feet while the car was traveling 150, and been safely across the tracks. Mathiesen was familiar with the running of street cars in the city of Omaha. He is corroborated to some extent as to the distance of the car by the evidence of the motorman. Mathiesen says that as his ponies were stepping onto the track he heard the bell of the car, and the motorman testifies that he struck the gong when he was just east of the alley in the middle of the block, so that, according to the motorman's testimony, the car ran from just east of the alley in the middle of the block to the point east of the curb on the west side of Twentieth street, a distance of about 150 feet, before Mathiesen traveled 21 feet. A computation will show that if Mathiesen was driving at the rate of 3 or 4 miles an hour the car must have been traveling at the rate of over 20 miles an hour in order to traverse this distance in that space of time, and since the motorman tried to stop the car as soon as he saw the team, and did stop it within 6 or 8 feet after it struck the wagon, these facts would warrant the jury in believing that it must have been traveling at a much greater rate before its speed was checked in the endeavor to avoid the collision. From these considerations, we are convinced that it would invade the province of the jury for a court to say that a man of ordinary prudence, traveling at the rate Mathiesen was at the time he saw the car, would not have been justified in attempting to cross the street railway track in front of the approaching car with the car at the distance that it was when he saw it, and that the matter was properly left to the jury to determine. We have already said in this case that issues of primary and contributory negligence are ordinarily questions of fact for the jury, and we find nothing in the evidence in this case to take it out of the ordinary class. The facts in this case are not unlike those in *Omaha Street Railway v. Cameron*, 43 Neb. 297, 61 N. W. 606, and the principles of law therein enunciated apply.

This court has refused to adopt the rule that persons traveling

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upon a public highway along or across a street railway are held to the exercise of the same degree of care as when traveling across an ordinary steam railroad. The streets of a city are made for public travel, as well for that portion of the public travels with ordinary vehicles as for that portion which travels in the cars of a street railway company. The driver of an ordinary vehicle has the same right to use the street as the street railway company, but he cannot shut his eyes to the dangers incident to the ordinary and reasonable operation of the cars of such company. If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it. What an ordinarily prudent and cautious person would do under like circumstances is peculiarly a question for the jury. *Metropolitan Street Railway Co. v. Slayman*, 64 Kan. 722, 68 Pac. 628.

Plaintiff in error further complains of the exclusion of certain evidence offered for the purpose of showing that the plaintiff could have seen an approaching car before he reached Leavenworth street from the south, and that a certain church building which stood on the south side of the street did not interfere with his view to such an extent as to prevent him from seeing the car at a greater distance than that at which he swears he saw it. Ordinarily, where it is a material question whether certain objects can be seen from certain points under certain conditions, it is entirely proper and competent to prove by witnesses, who have gone to the spot for the purpose of making observations with reference to the disputed fact, to testify as to what may be seen in that locality, providing that all the surrounding conditions and circumstances are substantially the same as when the event to be investigated occurred; but in this case we doubt whether this testimony was material. The question was not whether the plaintiff might not have seen the car at a greater distance, but whether he was guilty of negligence in attempting to cross the tracks with the car at the distance at which it actually was. Besides, the error, if any, was cured, because the jury were permitted to inspect the locality, and in all probability they were fully as competent to observe any obstructions to the view as the witnesses whose testimony was offered. We think the defendant suffered no prejudice by the exclusion of this testimony.

Complaint is made of the instructions given and refused, but they seem to be as favorable to the defendant as it was entitled to, and the issues were fairly submitted to the jury thereby.

It is further urged that the damages are excessive, but from an examination of the evidence we think this assignment is not well taken.

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We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

LOUISVILLE & N. R. CO. v. CROMINARITY.

(Supreme Court of Mississippi, June 12, 1905.)

[38 So. Rep. 633.]

Accident at Crossing—Obstructed View—Contributory Negligence—Failure to Stop Vehicle.*—Where, in an action against a railroad company for injuries at a crossing, it appeared that plaintiff approached the crossing when no train was scheduled to pass, and that the view of the track was obstructed, except for the width of the street, and that plaintiff slowed up and looked and listened for a train, he was not guilty of contributory negligence, as a matter of law, for failing to stop.

Same—Proximate Cause—Failure to Give Signals.†—Where, in an action for injuries at a crossing, the complaint alleged negligence on the part of defendant in running at an excessive speed through a city, and in failing to give the required signals, and it appeared that, not knowing of the approach of the train, plaintiff drove very close to the tracks when the train appeared and frightened his horse, whereby he was injured, a verdict for plaintiff on the theory that the negligence in failing to give signals was the proximate cause of the accident was warranted.

Appeal from Circuit Court, Harrison County; M. T. McDonald, Judge.

Action by L. P. Crominarity against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff's declaration alleges "that by and through the negligence and improper conduct of the defendant corporation, by

*As to the care required of a highway traveler at a railroad crossing where the view is obstructed, see foot-note appended to *Goldmann v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 14 R. R. R. 582, 37 Am. & Eng. R. Cas., N. S., 582; foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579; foot-notes appended to *Golinvaux v. Burlington, etc., R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

†As to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Flaherty v. Boston & M. R. R. Co.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, etc., R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

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its said agents and servants in that behalf, in running said train of cars and locomotive at a greater rate of speed than six miles per hour, and its failure to ring a bell or blow a whistle as aforesaid, plaintiff thus receiving no warning of the approach of said train, plaintiff was unable to get his horse a safe distance from said track before said train crossed said street, and said train then and there ran so close to said carriage that the engines and cars ran right up to the nostrils of plaintiff's horse, just grazing it, and that the concussion and frightful rate of speed of said engine and cars caused the horse pulling said carriage to become so frightened and unmanageable as to then and there suddenly turn—plaintiff being unable to manage him, although using all means at his command—thereby turning over the carriage and throwing plaintiff out upon the ground with great violence and force, so that plaintiff was greatly bruised, hurt, and wounded." The declaration also alleges that this occurred in the corporate limits of the city of Biloxi, at a much-frequented street crossing. Plaintiff's evidence was to the effect that plaintiff was driving a gentle horse, approaching the crossing on Reynoir street (the most-frequented street in Biloxi, the crossing being near the railroad depot), on Sunday morning, about 11 o'clock, when no train was scheduled to pass; that the defendant company had placed box cars along the railroad on both sides of the street, just leaving the width of the street open, and greatly obstructing the view of the railroad tracks; that, on approaching the crossing, plaintiff slowed up and looked and listened for a train, but did not stop; that he heard no train, and saw none, and when his horse's head got within about 6 feet of the track a train dashed by, running about 35 miles an hour, without ringing a bell or blowing a whistle, and frightened the horse, which suddenly turned, throwing plaintiff out of the buggy and injuring him.

The following instructions asked by defendant were refused by the court:

"(1) The court charges the jury that the burden is upon the plaintiff to reasonably satisfy them that the fact that the train was running more than six miles an hour frightened the horse and caused him to turn. If you are not reasonably satisfied of this, you should find a verdict for defendant.

"(2) If the jury are not reasonably satisfied from the evidence whether the horse would or would not have behaved in the same way, had the train been running at the rate of six miles an hour or less, they ought to find a verdict for defendant.

"(3) The court charges the jury that the burden is on the plaintiff to reasonably satisfy them that the fact that the train was running more than six miles an hour frightened the horse and caused him to turn, and, if he has failed to reasonably satisfy you of this, you ought to find a verdict for defendant.

"(4) If the jury are not reasonably satisfied from the evidence whether the horse would or would not have behaved in the same

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way, had the train been running at the rate of six miles an hour or less, they ought to find a verdict for defendant."

Gregory L. Smith and J. W. Goldsby, for appellant.

L. H. Doty and J. H. Mize, for appellee.

TRULY, J. The declaration in this cause predicates the right of recovery for the injury inflicted upon the negligence of the appellant, consisting of two distinct and different, though combined and concurrent, constituents. The first ground of negligence averred is the running of a train through an incorporated city at a rate of speed far exceeding the statutory limit. The second ground of negligence is the failure to ring the bell or sound the whistle when approaching and crossing a highway or street. These two elements of negligence, under the proof in the instant case, were inseparably joined and integrated, and the two, operating jointly, caused the injury sued for. The facts as developed show by a very clear preponderance of the evidence—uncontradicted at all, save by one witness, whose testimony was discredited by the jury—that on the occasion in question the employees of appellant were guilty of both negligent acts charged in the declaration. The train was running at an excessive rate of speed as an extra or special, upon no specific schedule, and at an unusual time for a train to pass, over the most-frequented crossing in the city of Biloxi, without ringing the bell or sounding the whistle. This flagrant violation of two express statutory provisions intended to regulate the operation of trains, and thereby converse the public safety, constitutes negligence, of course; and, if the proximate cause of the injury inflicted, appellee should recover, unless his own negligent conduct contributed to the accident.

The proposition presented by the appellant, upon which hangs its chief argument seeking to have the conduct of appellee condemned as being such contributory negligence as should absolutely preclude any recovery, is that the appellee, in approaching the crossing where the injury occurred, did not bring his horse to an absolute halt before driving on the track. Many decisions and a multitude of authorities are cited to show that other courts have held that the mere failure to stop before driving on a railroad crossing constitutes, as a matter of law, such negligence as forbids recovery for any injury inflicted by a passing train. We decline to adopt any such rigid rule. What constitutes negligence must depend always upon the surrounding conditions and the attendant circumstances of the particular instance. No hard and fast rule of action can be prescribed, which will make the same course of conduct under any and all circumstances either wise or unwise, cautious or reckless. Instances may be imagined when to stop before driving on a track would be hazardous in the extreme. In other cases driving upon a railroad track without stopping would be in no degree negligent. So, too, it must be conceded that there are many cases where to drive upon a cross-

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ing without first stopping would be negligence of the grossest character. Due caution in one instance might well be deemed foolhardiness under different circumstances. The true rule is that it is incumbent upon the traveler to use that degree of caution which is rendered necessary by a reasonable regard for his safety under the peculiar circumstances and conditions by which he is at the time confronted. It is the duty of a traveler in approaching a crossing to use all reasonable precaution to apprise himself of the approach of a train, but whether that reasonable precaution will demand that he shall "stop and look and listen," or whether any lesser degree of care on his part will be sufficient, must generally, though not invariably, be a question of fact; and, being a question of fact, it should be submitted to the jury, under proper instructions, for their decision. That course was adopted in the case at bar. The jury was instructed that it was the duty of the appellee, in approaching the crossing, to have taken every reasonable precaution, in view of the obstructed condition of the crossing, to apprise himself of any approaching train, and to have listened in order to ascertain if there was any such train approaching, and that failure to observe this degree of care would defeat recovery. This was a correct exposition of the law, and was fully as favorable as the appellant had the right to demand, in view of the inexcusable negligence of its employees and their flagrant disregard of the rights of the public in the operation of the train causing the injury. It was, under the facts of this record, the province of the jury, not the judge, to decide whether the conduct of the appellee constituted contributory negligence.

The other assignments of error presented by appellant, based upon the action of the court in refusing instructions, are without merit. The instructions refused were either erroneous, as propositions of law, or were upon the weight of evidence, and were therefore correctly denied. The only two important questions involved in the case, namely, the negligence of the appellant and the alleged contributory negligence of the appellee, were fairly submitted to the jury, and we see no ground for disturbing their decision upon the facts.

But it is urged no recovery can be sustained for appellee in the instant case, because the right of action is by the declaration based on the negligence of the employees of appellants in running the train at an excessive rate of speed, while the case was submitted to the jury on the theory that the negligent failure to give the statutory signals and warnings was the proximate cause of injury. The reasoning by which this contention is sought to be sustained is entirely too artificial and refined, and will not stand the test when scrutinized in the light of the record. The gravamen of the complaint is the negligence of the appellant. Two palpable omissions of duty, it is averred, constituted that negligence, and both contributed to the injury—the one indirectly, the other proximately. Had the excessive rate of speed not been

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coupled with the failure to give the customary signals, the accident might not have happened, because the appellee, having timely warning of the approach of the train, could have avoided the dangerous situation into which the appearance of safety intrapped him. We are not prepared to say, therefore, that the jury erred in holding that the negligence in failing to ring the bell and sound the whistle was the proximate cause of the accident.

The judgment is affirmed.

SOUTH GEORGIA RY. CO. v. RYALS.

(Supreme Court of Georgia, June 15, 1905.)

[51 S. E. Rep. 428.]

Railroads—Killing Stock—Action for Damages—Declaration.—In a suit brought in a county court against a railway company for the negligent killing of stock, where the declaration alleged in general terms "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employees," it was subject to a special demurrer on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; and in the absence of amendment the declaration should have been dismissed.

Same—Ownership.—Where suit was brought for the negligent killing of stock by a railroad company, and the declaration failed to allege the ownership of such stock, it was subject to special demurrer on that ground.

Same—Allegations as to Negligence.*—If a declaration alleges with sufficient specification negligence on the part of the defendant and its agents or employees, and in what such negligence consisted, and where it occurred, it is not necessary to set out the names of the particular agents or employees alleged to have committed it.

Trial—Practice.—The practice and modes of procedure in the county court are similar to those in the superior court.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by C. W. Ryals against the South Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

This case originated in the county court of Brooks county, and was appealed to the superior court. Ryals brought suit against the South Georgia Railway Company, alleging that the defendant had damaged him in the sum of \$70, besides interest, by killing certain cattle and a hog which were described in an account attached to the declaration. The only allegation of negligence was "that said damage was done by the running of the locomotive

*See Northern Ala. Ry. Co. v. Shea (Ala.), 14 R. R. R. 514, 37 Am. & Eng. R. Cas., N. S., 514; Rinard v. Omaha, etc., Ry. Co. (Mo.), 22 Am. & Eng. R. Cas., N. S., 34; Woodward Iron Co. v. Herndon (Ala.), 7 Am. & Eng. R. Cas., N. S., 124.

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and cars of said defendant in said county in a careless and negligent manner by said defendant's employees." The defendant demurred to the declaration generally, and also on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; that it failed to allege that the stock killed belonged to the plaintiff; that the petition was not arranged in orderly paragraphs, and that it failed to state any facts constituting negligence, or to state what agents or employees of the defendant were negligent. The demurrer was overruled, a recovery was had by the plaintiff, a motion for a new trial was overruled, and the defendant excepted. Among other assignments of error was one based on the overruling of the demurrer, to which ruling a bill of exceptions pendente lite has been duly filed.

L. W. Branch, for plaintiff in error.

S. S. Bennet, for defendant in error.

LUMPKIN, J. (after stating the above facts). A general allegation in a declaration that damage was done by the running of the locomotive and cars of a certain railroad company in a careless and negligent manner by its employees is the subject to special demurrer. In the absence of amendment, a declaration based on such an allegation should be dismissed. *Seaboard Air-Line Ry. v. Pierce*, 120 Ga. 230, 47 S. E. 581; *Macon R. Co. v. Stewart*, 120 Ga. 890, 48 S. E. 354; *Russell v. Central of Ga. Ry. Co.*, 119 Ga. 705, 46 S. E. 858. As to a suit in a justice's court, see *Macon & Birmingham R. Co. v. Walton*, 121 Ga. 275, 48 S. E. 940. Section 2321 of the Civil Code of 1895, under which, upon proof of injury from the operation of its locomotives, cars, and other machinery, a presumption of negligence arises against the railroad company, is a rule of evidence, and does not dispense with proper pleadings. In a suit against a railroad for the killing of stock a failure to allege ownership of the stock furnishes ground for special demurrer. *Ga. Ry. & Electric Co. v. Knight* (March term, 1905) 50 S. E. 124. If there is a sufficient allegation of negligence on the part of a railroad company in respect of time, place, and circumstance, it furnishes no ground for demurrer that the declaration does not give the name of the negligent agent. *Pierce v. S. A. L. Ry.*, 122 Ga. —, 50 S. E. 468. The practice and modes of procedure in the county court are similar to those in the superior court. Civ. Code 1895, §§ 4198, 4204. The court having erred in overruling the demurrer, all that occurred subsequently to that ruling was nugatory, and need not now be considered. *Macon R. Co. v. Walton*, 121 Ga. 276, 48 S. E. 940.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

E. SWINDELL & Co. v. ALABAMA MIDLAND RY. Co.

(Supreme Court of Georgia, June 15, 1905.)

[51 S. E. Rep. 386.]

Railroads—Fires Set by Engine—Nonsuit.*—The evidence offered to establish the fact that the fire was communicated to the property of the plaintiff by the engine of the defendant was entirely circumstantial, but was of such a character as to authorize a finding that the fire was so communicated. If this fact were established, the law would raise a presumption that the defendant was negligent, and it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by E. Swindell & Co. against the Alabama Midland Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

A. L. Townsend and *A. H. Russell*, for plaintiff in error.

Kay, Bennet & Conyers and *T. S. Hawes*, for defendant in error.

COBB, J. When this case was here before (*Alabama Midland Ry. Co. v. Swindell & Co.*, 117 Ga. 883, 45 S. E. 264), it was said that the evidence disclosed a case very similar to that of the *Southern Railway Company v. Pace*, 114 Ga. 712, 40 S. E. 723. In the latter case the evidence for the plaintiff was altogether circumstantial, but was sufficient to raise a presumption of negligence, though this presumption was completely rebutted by the testimony for the defendant. The evidence for the plaintiff in the present case is substantially the same as it was before, and therefore did not authorize the grant of a nonsuit. There was evidence from which a jury could find that the fire was communicated to the plaintiff's property from the defendant's engine, and if this fact was established the law would raise a presumption of negligence against the company. If upon another trial the evidence for the plaintiff and the defendant is in substance the same as it was when the case was before this court at the March term, 1903, the judge would be authorized to direct a verdict for the defendant. But even under the ruling then made a nonsuit was improper.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

*See foot-note appended to *Chicago, etc., R. Co. v. Beal* (Neb.), 8 R. R. R. 468, 31 Am. & Eng. R. Cas., N. S., 468; foot-notes appended to *Dyer v. Maine Cent. R. Co.* (Me.), 14 R. R. R. 757, 37 Am. & Eng. R. Cas., N. S., 757.

MAY v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana, July 3, 1905.)

[81 Pac. Rep. 328.]

Compulsory Physical Examination—Allowance.*—In an action for personal injuries, the district court, in the absence of legislation, may not compel the plaintiff to submit to a physical examination by physicians appointed by the court.

Witnesses — Privileged Communications — Physicians — Waiver of Privilege.—Under Code Civ. Proc. § 3163, providing that a licensed physician, without his patient's consent, cannot be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe, where plaintiff on cross-examination admitted that a certain physician had attended her and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her.

Appeal from District Court, Ravalli County; F. C. Webster, Judge.

Action by Mary May against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying its motion for a new trial, defendant appeals. Affirmed.

Wm. Wallace, Jr., and Charles Donnelly, for appellant.

Henry L. Meyers and R. A. O'Hara, for respondent.

HOLLOWAY, J. In September, 1903, Mary May commenced this action against the Northern Pacific Railway Company to recover damages for personal injuries alleged to have been occasioned by the negligence of the agents and employees of the defendant company. The answer of defendant denies all the material allegations of the complaint. Prior to the date set for the trial of the cause the defendant company attempted, unsuccessfully, to induce the plaintiff to submit to a physical examination by surgeons selected by the company, presumably. Immediately prior to the trial the defendant made application to the court for an order compelling the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court. This application was denied. The cause having been brought on for trial, and the plaintiff having testified as to the cause of her injuries and their nature and extent, and having produced Drs. Brethour and Buchen, her attending physicians, as witnesses in her behalf, upon cross-examination admitted that one Dr. McGrath had also attended her in the early stages of her illness as her physician. The defendant in its behalf called Dr. McGrath, and asked him to state in what condition he found the plaintiff when he called upon her. This was objected to on the ground that it called for testimony from a physician con-

*See foot-note appended to *Brown v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 8 R. R. R. 783, 31 Am. & Eng. R. Cas., N. S., 783.

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cerning matters discovered by him while acting as physician for the plaintiff, and the giving of such testimony by Dr. McGrath would violate the confidential relation of physician and patient, contrary to the provisions of section 3163 of the Code of Civil Procedure. This objection was sustained, and exception taken. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon, and from an order denying defendant's motion for a new trial, it appealed.

Only two errors are assigned: (1) The order of the court denying defendant's application for an order compelling the plaintiff to submit to a physical examination, and (2) the order of the court sustaining an objection to the question asked Dr. McGrath. These will be considered in the order presented in the briefs.

1. Compulsory Physical Examination. May a district court in this state, in an action for personal injuries, compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court? Upon this question the authorities are in hopeless conflict, and any attempt to reconcile them would be barren of results.

The first reported case in which the power of the court to compel such examination is asserted is *Walsh v. Sayre*, 52 How. Prac. 334, decided by the New York Superior Court in 1868. This was an action for damages for malpractice, and upon the analogy to cases of mayhem, divorce on the ground of impotency, and cases of controversies between a widow, claiming to be pregnant by the decedent, and other heirs of the estate, wherein such examinations had been ordered, it was held that a court of law could compel the plaintiff to submit to a physical examination. A leading case on the subject is *Schroeder v. Ry. Co.*, 47 Iowa, 375, decided in 1877. Mention is not made of the New York case cited above. The opinion states that there were no precedents at the time of its rendition. The power of the trial court to compel the plaintiff to submit to such an examination is asserted. In 1881 the same question came before the Supreme Court of Ohio, in *Turnpike Co. v. Baily*, 37 Ohio St. 104, and, upon the authority of the *Schroeder Case*, the power of the trial court to make and enforce such an order is again asserted. The next case is *Railroad Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, decided in 1883, upon the authority of the *Schroeder Case* above, the court preferring to follow the Iowa court, rather than the Supreme Court of Missouri in *Lloyd's Case*, 53 Mo. 509. In November, 1884, in *White v. Ry. Co.*, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154, the Supreme Court of Wisconsin decided the same question in the same way upon the authority of *Walsh v. Sayre* and the *Schroeder Case*. In *Hatfield v. Ry. Co.*, 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14, decided in 1885, the power is asserted, but by way of dictum. *Railroad Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189, decided in 1889, is another case frequently referred to by

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courts holding this view. In the opening paragraph of the opinion in this case, section 206 of the Georgia Code is quoted, as follows: "Every court has power * * * to control in furtherance of justice the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter pertaining thereto." No further reference is made to this statute, but the power is asserted upon the authority of the cases herein considered above. In November, 1885, in *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584, the same question is decided upon the authority of *Walsh v. Sayre*, the *Schroeder Case*, and the *White Case*; *Shaw v. Van Rensselaer*, 60 How. Prac. 143. *Harrold v. R. R. Co.*, 21 Hun, 268, and *Bryant v. Stilwell*, 24 Pa. 317, are also cited. In *Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561, decided in 1893, the authorities for and against the assertion of the power are reviewed by the Supreme Court of Michigan, and a decision rendered in favor of the existence of the power in the trial court. In *Belt E. L. Co. v. Allen*, 102 Ky. 551, 44 S. W. 89, 80 Am. St. Rep. 374, decided in 1898, the same position is taken by the Supreme Court of Kentucky. In 1899, in the Supreme Court of Washington, in *Lane v. Railway Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821, a like decision was made. The last state to assert this view is North Dakota, in *Brown v. R. R. Co.*, 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564, decided in 1903. In 1873 the Supreme Court of Missouri, in *Loyd v. Railroad Co.*, 53 Mo. 509, had before it a personal injury case in which an application had been made to the trial court for an order to compel the plaintiff to submit to a physical examination. Respecting this application, the court said: "The proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries is unknown to our practice and to the law." In 1882, in *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588, the Supreme Court of Illinois held that the trial court could not make or enforce such an order. In 1889, in *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409, the same conclusion was reached by the Supreme Court of Indiana. In 1891 the question came before the Supreme Court of the United States in *Railroad Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, and, after a careful consideration of the authorities, it was held by a divided court—seven to two—that the power does not reside in the federal trial courts. This was followed by the Supreme Court of Oklahoma in *City of Kingfisher v. Altizer*, 74 Pac. 107, by the Court of Civil Appeals of Texas in *Railway Co. v. Cluck* (Tex. Civ. App.) 73 S. W. 569, and by the Supreme Court of Massachusetts in *Stack v. Ry. Co.*, 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269.

The foregoing review shows the decisions of courts upon the first presentation of this question to them. The case of *Walsh v. Sayre* was followed in *Shaw v. Van Rensselaer*, above; but in

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1891 the question came before the Court of Appeals of New York in *McQuigan v. Ry. Co.*, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507, and *Walsh v. Sayre and Shaw v. Van Rensselaer* were overruled. The *McQuigan* Case was followed in *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, 53 N. E. 670, decided in 1899. The Legislature of New York, however, circumvented the effect of these last decisions by enacting a statute directly conferring upon trial courts the power to make and enforce such an order. In *Shepard v. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390, decided in 1885, a view contrary to that expressed in *Loyd's Case* is intimated by the Supreme Court of Missouri, and in *Sidekum v. Ry. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549, a decision was rendered which had the effect of directly reversing the *Loyd Case*; and the *Sidekum Case* was followed in *Owens v. Ry. Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. The *Schroeder Case* was followed by the Supreme Court of Iowa in *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; and *Railway Co. v. Thul* was approved and followed in *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, and again in *Railway Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90. *White v. Milwaukee Ry. Co.* was followed by the Supreme Court of Wisconsin in *O'Brien v. La Crosse*, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831. *Sibley v. Smith*, above, was followed in *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147. The Supreme Court of Indiana has been most uncertain in its treatment of the question. *Kern v. Bridwell* above was decided in May, 1889; but in November of the same year, in *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355, a contrary doctrine is announced. In 1891, in *Railroad Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, the announcement in *Hess v. Lowrey* is pronounced dictum, and the authority is again distinctly denied. But the *Newmeyer Case* is distinctly reversed in *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200, and, so far as we are aware, the last decision from that court asserts the power. *Belt E. L. Co. v. Allen* is affirmed in *Distilling Co. v. Riggs*, 104 Ky. 1, 45 S. W. 99, and in *Railroad Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733. In *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354, decided in 1899, the dictum in the *Hatfield Case* is declared to be the law in Minnesota. *Parker v. Enslow* is followed in *Railway Co. v. Rice*, 144 Ill. 227, 33 N. E. 951, and in *Railway Co. v. Story*, 104 Ill. App. 132. In *Railway Co. v. Underwood*, 64 Tex. 463, and *Railway Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, the court, without deciding, intimated that the trial courts in Texas had the power to compel such examination; but in *Railway Co. v. Cluck* (Tex. Civ. App.) 73 S. W. 569, decided in 1903, the question is squarely met and decided, and the authority denied. This last case is affirmed, and the doctrine reannounced upon appeal to the Supreme Court of Texas, in *Railway Co. v. Cluck*, 77 S. W. 403,

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64 L. R. A. 494. The question has been before the Supreme Court of Nebraska, but not decided, in *Railroad Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724, in *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419, *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336, and *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62. The syllabus to the decision in *Mills v. Railway Co.*, 40 Atl. 1114, announces that the superior court of Delaware denies the power, but there is nothing in the body of the opinion with reference to the question. The case of *Carrico v. Railroad Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, is frequently cited in these opinions, but the question is not decided by the West Virginia court at all. The federal and territorial courts have followed the decision in the *Botsford Case*, in *Railway Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413, and in the *Oklahoma case* cited.

If the last announcements of these several courts may be taken to indicate the law in their respective states, a review of the decisions discloses that the power of trial courts to compel such examination is asserted in Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Washington, and Wisconsin, and denied in the federal courts, and in Illinois, Massachusetts, and Texas, and was denied in New York until specifically granted by direct legislative enactment.

The bare assertion that trial courts possess this power, in the absence of any legislation, and without common-law precedents, has led to the greatest possible confusion among the decisions of the very courts asserting it. (1) What is the source of the power? (2) To what extent may it be carried? (3) May the defendant demand the order as a matter of right? And (4) how will the court enforce obedience to its order? Singularly enough, the first of these questions appears to have received little or no consideration.

(1) In *Railroad Co. v. Childress*, the section of the Georgia Code above is quoted; but further reference is not made to this provision of the law, and it can hardly be presumed that the decision proceeds upon the assumption that the source of the power is the statute quoted. That section is similar in its provisions to subdivision 5 of section 110 of our Code of Civil Procedure. But that section adds nothing to the powers already possessed by courts of general jurisdiction, for it is merely declaratory of the common law. In some of the opinions it is said that the power is one inherent in the trial courts. In *Graves v. Battle Creek*, decided in 1893, it is said, "It is true that the rule is one of modern growth." Most of the courts content themselves with the bare assertion of the power, without any discussion of its origin.

(2) If the plaintiff may be compelled to submit to a physical examination, is the authority to order it an absolute or only a qualified one? May the plaintiff be compelled to submit to the administration to him of anæsthetics or drugs by which he loses consciousness altogether, or, if the injury is an internal one, may

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he be compelled to submit to the use of such surgical instruments as the physicians appointed to make the examination may see fit to use? May he be compelled to exhibit his injury to the jury in open court, and, if the plaintiff be a woman, is there any protection whatever against violence to her feelings? By some of these courts it has been held that anæsthetics and drugs should not be used (*Schroeder v. Ry. Co.*; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616), and that plaintiff should not be compelled to submit to the use of surgical instruments (*O'Brien v. La Crosse*); but in *Railway Co. v. Palmore* it was held that the plaintiff could be compelled to submit to the examination, and to an injection of a drug into his injured eye to dilate the pupil; and in *Hall v. Manson* it was held that the plaintiff, a woman, could be compelled to remove her shoe and stocking, that an examination might be had and measurements taken of her injured ankle in the presence of the jury. In *Railway Co. v. Hill*, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764, above, the Supreme Court of Alabama said: "When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice on the other, the law cannot hesitate. Justice must be done." This is quoted with approval in *Lane v. Railway Co.* However, in *Graves v. Battle Creek* it is said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination * * * where the sense of delicacy of the plaintiff may be offended by the exhibition." To the same effect is the decision in *Ottawa v. Gilliland*, above.

(3) In *Sibley v. Smith* and in *Railway Co. v. Thul* it is held that the defendant may demand the order as a matter of right, but that in granting it the court may exercise its discretion. We are unable to understand this contradiction of terms, and observe that in most of the cases it is held that the application is one addressed to the sound discretion of the trial court, subject to review for manifest abuse only.

(4) In the *Schroeder Case* and in *Sibley v. Smith* it is said that refusal of the plaintiff to comply with the order would constitute contempt of court, and subject the plaintiff to the punishment of a recusant witness; while in *Turnpike v. Baily*, *Lane v. Railroad Co.*, *Wanek v. Winona*, *Brown v. Railroad Co.*, and in the dissenting opinion in the *Botsford Case*, it is said that it is not a question of contempt; that the court cannot compel the plaintiff to comply with the order which it has made, but, if he refuses, the court may dismiss his action or refuse to permit him to testify.

From the assertion of the power arising from the apparent necessities of extraordinary cases, as disclosed by the decision in the *Schroeder Case*, we observe the almost limitless extent to

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which the power has been carried ; and, not content with applying the rule to civil actions for personal injuries, it has been extended to apply to the prosecuting witness in a criminal case (*King v. State*, 100 Ala. 85, 14 South. 878), and, for the same reasons advanced for the exercise of the power in civil actions by the courts asserting its existence, the doctrine has been applied to a criminal case, and the defendant compelled to bare to the view of the jury part of the unexposed portions of his body upon which were certain tattoo marks, in order to enable the state to complete the case against him, with the result that the defendant was convicted of a capital offense. *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

With this review of the decisions, we pass to a direct consideration of the question as it relates to the trial courts of this state. Our district courts are courts of general jurisdiction created by the Constitution (article 8, § 1), their jurisdiction specifically defined by that instrument (article 8, § 11), and their powers and authority derived from the Constitution and laws of the state. The laws embrace the statutes and the common law, so far as it has not been supplanted by the statute or is not inconsistent with our conditions. In considering, then, the question of the possible source of such a power as the one asked to be asserted, we search the Constitution and laws for a grant of the power, rather than for limitations upon the power, as appears to be intimated as the doctrine in *Brown v. Railroad Co.*, above ; and unless the authority is granted by the Constitution or statutes, by express terms or by necessary implication, or unless the authority existed at common law, we say without hesitation that it cannot be exercised ; for there is no such thing in this state as the inherent power of a court, if by that is meant a power not authorized by law.

The only instances in which such power was invoked at common law were in actions for divorce upon the ground of impotency, appeals of mayhem, cases of atrocious battery, cases of conviction of a woman of a capital crime who is alleged to be pregnant, and controversies between heirs and a widow claiming to be pregnant by the deceased. No one of these rules has ever obtained in this country, unless it has been in cases of divorce on the ground of impotency. The power was exercised by the English ecclesiastical courts, and was a graft from the civil law. In Montana the authority to grant divorces is lodged in our district courts, sitting as courts of equity, and to admit that these courts may exercise the same powers as their English prototypes or the ecclesiastical courts, a part of whose powers they have fallen heir to, argues nothing here. Neither does the fact that here the same court administers law and equity, for, while our courts of equity follow the practice of the English chancery courts in so far as the statutes have not ordained otherwise and the English practice is adapted to our conditions, our law courts are confined strictly to the authority given by the Constitution and statutes and the rules applicable to law courts at common

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law. A power exercised by a court of equity is not a precedent for the exercise of the same power by a court of law.

It is true that in a few instances the English law courts attempted to compel discovery, but these have been denominated mere usurpations of authority, and in later instances those same courts denied the authority in similar cases, and refused to countenance its exercise (*Newham v. Tate*, 1 Arnold, 224; *Turquand v. Strand Union*, 8 Dowl. 201), and, for the purpose of enabling them to do that which they had attempted to do without authority as above indicated, the statutes of 14 & 15 Vict. c. 99, and 17 & 18 Vict. c. 125, were enacted. It would seem that the paucity of common-law precedents affords the very best evidence that the power was not exercised by English law courts, for the English people have never tamely submitted to any curtailments of their personal privileges or their personal liberty. The very fact that at common law the plaintiff in an action of this character could not testify—was not a competent witness—lends further support to the contention that the power was not asserted.

No one would seriously contend that, in the absence of statutes, our law courts could compel the inspection of books and papers, or an examination of property, out of court; indeed, in order to clothe them with some, at least, of the powers possessed by courts of equity, sections 1314, 1317, and 1810 of the Code of Civil Procedure were enacted, as was likewise section 2097 of the Penal Code for obvious reasons, and what we have accomplished by the enactment of these statutes other states have accomplished, not by the arbitrary pronouncements of courts, but by direct legislation. Added force is given to our views by the fact that the Legislature which enacted these sections above into our law refrained from granting the power invoked in this case.

The reasons advanced by the courts for the exercise of this power, in the absence of any direct authority, do not commend themselves to us. It is said by some that the power is analogous to the proceeding for discovery; but discovery was not compelled by the law courts at common law, and the best evidence of this is found in the fact that equity interposed in this behalf to prevent failure of justice. If the law courts had possessed and had exercised the power, there would have been no excuse for equity calling into existence the bill of discovery. By other courts it is said that the assertion of this power is necessary to prevent the plaintiff from maligning and bolstering up a fictitious case "by the very unreliable speculations of so-called medical experts." *Wanek v. Winona*, *supra*. It is a curious process of reasoning which enables a court to characterize the solemn testimony of medical men as unreliable speculations when the witnesses are called by the plaintiff, but if these same physicians be called by the court, upon application of defendant, they immediately become the instrumentalities through which, not approximate, but exact, justice is to be done. Others, including the dissenting opinion in the *Botsford Case*, say it is strange that the plaintiff

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may, if he chooses, exhibit his injury to the jury, or may testify concerning it, or may have other witnesses do so, but he cannot be compelled to make such exhibition. We are of the opinion that even if the plaintiff might, as a matter of right, exhibit his injuries to the jury, it would not add to the argument in behalf of that view of the case. In this state, however, he does not possess that right. He may offer to do so, but it is within the discretion of the court to permit or refuse the offer, subject, of course, to review for a manifest abuse of that direction. Code Civ. Proc. § 3250.

The right to the inviolability of one's person is merely a privilege which plaintiff may waive, as a defendant may the constitutional guaranty that in a criminal case he cannot be compelled to be a witness against himself. The defendant cannot be compelled to be a witness against himself in such a case, but he may become such if he chooses; and, if he takes the witness stand in his own behalf, he so far waives the constitutional guaranty that he may be compelled to answer all proper questions on cross-examination, even though the answers may tend to incriminate him. And as a defendant may give evidence against himself, but cannot be compelled to do so unless he waives the privilege, so the plaintiff may exhibit portions of the clothed parts of his body to the jury, if the court permits, but cannot be compelled to do so. The constitutional guaranty is not more solemn and binding in one instance than in the other. And, for the much stronger reason, plaintiff cannot be compelled to make such exhibition of himself to third parties, strangers to the case, in order that they may procure material for testimony.

Furthermore, our Code (part 4, Code Civ. Proc.) assumes to promulgate the general principles and rules of evidence which are in force in this state, and sets forth specifically the means of its production; and the same Code declares that "the Code establishes the law of this state respecting the subjects to which it relates" (section 3453). This portion of the Code assumes to define judicial evidence (section 3100), distinguishes the kinds (section 3104), and provides for the means by which legal evidence may be produced (sections 3300-3312). These provisions are ample to secure the attendance of a witness upon a court, and the production for use in evidence of any books, documents, or other things which the witness may by law be bound to produce; and sections 1314, 1317, and 1810, above, make provision for the examination of books, papers, and other property out of court. But, with these direct exceptions, there is no authority for compelling one litigant to furnish the means by which the other may procure evidence. The plaintiff may be compelled to go upon the witness stand and answer all proper questions put to him, or to produce books and papers in his control, or permit the examination of property in his possession, and, so far as the defendant may reap any benefit therefrom, it may be said that the plaintiff is compelled to furnish evidence for his adversary:

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but further than this there is no warrant in the law for our courts proceeding.

From the authority directly conferred upon the district courts of this state, there cannot be implied this extraordinary power. There is no grant of power from which it could be implied. However, the assertion of the power by certain courts is no more extraordinary than the remedy proposed for violation of the order. To say that a court can make an order but cannot enforce it, is remarkable, to say the least. To say that a court may refuse to permit a witness to testify, or dismiss his action if he refuse to comply with the order, is a doctrine which we cannot approve. Except in particular instances where the authority is directly conferred (and the present case does not present one of them), our courts have no authority to refuse to permit the plaintiff to testify or to dismiss his action. For a trial court of this state to make an order of this character and prescribe dismissal of the action as a penalty for noncompliance, would amount to a clear usurpation of authority in each instance. The order would be made without authority, and, in case of disobedience, the penalty inflicted without sanction of the law. The arguments advanced in favor of the assertion of this power might with propriety be addressed to a legislative assembly, but not to the courts, and we decline to resolve this court into a lawmaking body, even though it may be considered by text-writers more enlightened to do so. We prefer to follow the doctrine announced by the Supreme Court of Massachusetts—that it is a matter for legislative control, and, in the absence of legislation, the courts ought not to usurp the authority.

2. Privileged Communications. The appellant insists that Dr. McGrath should have been permitted to testify as to the condition of the plaintiff at the time he attended her as her physician. Section 3163 of the Code of Civil Procedure, among other things, provides: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * (4) A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Most of the states in the Union, if not all, have similar statutory provisions. It is to be observed that the plaintiff upon her direct examination merely described her injury, and told of her treatment by Drs. Brethour and Buchen. Upon cross-examination she admitted that Dr. McGrath had also attended her as her physician, and had treated her for the injury complained of; but she did not assume to detail any conversation had with Dr. McGrath, or to tell of the character or extent of the treatment which he gave her. Of course, if the patient calls the physician as a witness to testify, he thereby expressly consents to the proceeding, or, if he sits by and fails to object, he tacitly consents

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that the physician may testify. Furthermore, it has been held that where the patient directly attacks the physician, as by an action for damages for malpractice, he abandons the protection given by the statute, for he thereby challenges the physician to disprove the patient's contention as to the character of his injury or of the physician's treatment. *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442. It has also been held that where two or more physicians are employed at the same time, with respect to information gained at the same consultation, calling one of the physicians as a witness by the patient constitutes a waiver of the statutory prohibition as to the other or others (*Morris v. Railway Co.*, 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675), although this doctrine is disputed by respectable authority (*Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790). Likewise it has been held that, where the patient calls the physician as a witness at one trial, this constitutes a waiver of the privilege as to that physician upon a second trial of the same case. *McKinney v. Railroad Co.*, 104 N. Y. 352, 10 N. E. 544. But this doctrine has also been disputed in *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359, and *Grattan v. Insurance Co.*, 92 N. Y. 274, 44 Am. Rep. 372. But so far as our investigation discloses, no court of last resort has ever held that the mere fact that the patient testifies generally concerning his condition constitutes a waiver of the privilege granted by the statute. In *Marx v. Railroad Co.*, 10 N. Y. Supp. 159, the Supreme Court of New York held that, where the patient assumes to tell all that took place between himself and the physician, this constitutes a waiver of the privilege; and in *Treanor v. Railroad Co.*, 16 N. Y. Supp. 536, decided by the Common Pleas Court of New York City, it was also held that, where the patient testifies without reservation as to his injuries and their effect upon him, this likewise constitutes a waiver of the privilege. But these cases were later disapproved, and in effect directly overruled, by the Supreme Court of New York in *Fox v. Turnpike Co.*, 69 N. Y. Supp. 551, and *Dunckle v. McAllister*, 74 N. Y. Supp. 902, and by the Court of Appeals of New York in *Morris v. Railroad Co.*, above. In *Highfill v. Railroad Co.*, 93 Mo. App. 219, it is said that, where a patient goes on the stand and testifies as to what his physician found and said, he thereby waives the privilege under the statute. It may be safely said that the Missouri appellate court is now the only court asserting the doctrine announced by it, and even that case can hardly be a precedent in favor of the contention of appellant here, for this plaintiff did not assume to tell what Dr. McGrath had done for her, or to detail any conversations with him, and her statement that he had been her physician was not a voluntary one, but was brought out on cross-examination.

It is not the inherent incompetency of the evidence that precludes it being given, but it is the fact that the evidence comes from a person who occupies a certain relation of confidence to

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the patient, by virtue of which the statute says he shall not disclose his information without the consent of the person from whom he gained it. So far as we are aware, the authorities are uniform in holding against this contention of appellant. *Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872; *Railroad Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765; *Warsaw v. Fisher*, 24 Ind. App. 47, 55 N. E. 42; *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790; *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359; *Butler v. Railway Co.*, 30 Abb. N. C. 78, 23 N. Y. Supp. 163, affirmed in 143 N. Y. 630, 37 N. E. 826; *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36. The judgment and order are affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

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(Court of Appeals of Kentucky, Dec. 8, 1905.)

[89 S. W. Rep. 714.]

Removal of Causes—Nonresidence of Defendant—Joinder of Resident.*—Where a petition states a joint cause of action for injuries

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see *Madisonville Trac. Co. v. Saint Bernard M. Co.* (U. S.), 15 R. R. R. 99, 38 Am. & Eng. R. Cas., N. S., 99 (a proceeding for the taking of land by eminent domain, authorized by Ky., Stat. §§ 835-839, to be begun in the courts of that state, is, where the requisite diversity of citizenship exists, a suit involving a controversy between citizens of different states, of which a federal circuit court has original jurisdiction, and is therefore removable to that court when commenced in the state court); *Davis v. Chesapeake & O. Ry. Co.* (Ky.), 7 R. R. R. 347, 30 Am. & Eng. R. Cas., N. S., 347 (diverse citizenship as affected by fact that foreign corporation filed articles of incorporation within state); *Southern Ry. Co. v. Allison* (U. S.), 7 R. R. R. 431, 30 Am. & Eng. R. Cas., N. S., 431 (effect of domestication of foreign railroad under North Carolina Statute); *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624 (not error to refuse to remove case to federal court, on motion by remaining defendant, where, in action against nonresident railroad and two of its resident employees, the resident defendants were dismissed on their own motion in opposition to plaintiff's contention); *Cincinnati, etc., Ry. Co. v. Cook* (Ky.), 2 R. R. R. 321, 25 Am. & Eng. R. Cas., N. S., 321 (right to remove to federal court where nonresident corporation and resident servant are properly joined as defendants); *Calvert v. Southern Ry. Co.* (S. Car.), 5 R. R. R. 481, 28 Am. & Eng. R. Cas., N. S., 481 (foreign corporation under statute of South Carolina is a nonresident of that state for purposes of removal of cause to federal court); *Arkansas v. Kansas & Texas Coal Co.* (U. S.), 1 R. R. R. 337, 24 Am. & Eng. R. Cas., N. S., 337 (a suit in a state court between a state and foreign corporation is not removable to the United States

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against a nonresident railroad and a resident engineer, the case is not removable to the federal court.

Railroads—Operation—Applicability of Rules.—Where a freight and a passenger train were ordered to meet at a certain station, the passenger train being ordered to wait for the freight, a rule of the railroad requiring a train of inferior class to take a siding and clear a train of superior class on meeting such a train, and requiring a train of inferior class to keep five minutes off the time of a train of superior class following it, is inapplicable.

Same—Construction of Rules.—A rule of a railroad requiring a train of inferior class to take a siding and clear a train of superior class on meeting such a train, requires a freight train, on meeting a passenger train, to clear it by getting on a siding, but does not require the freight train, when it is upon the siding, to remain in the same place.

Carriers—Injuries to Passengers—Actions—Evidence.—In an action against a railroad for injuries to a passenger who was walking along a side track to get on his train, caused by his being struck by a freight train which was on the siding, the reading in evidence of a rule of the

circuit court as a controversy between citizens of different states, as a state is not a citizen); *Central Ohio R. Co. v. Mahoney* (C. C. A.), 3 R. R. R. 499, 26 Am. & Eng. R. Cas., N. S., 499 (action by citizens for joint tort against lessor of railroad, a state corporation, and receivers of lessee, citizens of another state, improperly removed to federal court, on petition of receivers, alleging that other defendant had no interest or liability jointly with receivers); *Wilson v. Southern Ry. Co.* (S. Car.), 5 R. R. R. 496, 28 Am. & Eng. R. Cas., N. S., 496 (foreign corporation becoming domestic corporation under statute of South Carolina is a nonresident of that state for purposes of removal of case to federal court); note, 14 Am. & Eng. R. Cas., N. S., 827 (removal of cause against federal corporation to federal court); notes, 14 Am. & Eng. R. Cas., N. S., 827, 19 Am. & Eng. R. Cas., N. S., 175 (right of foreign corporation to remove to federal court as affected by state legislation creating corporation with same name and membership); note, 21 Am. & Eng. R. Cas., N. S., 87 (whether action against master and servant for servant's negligence may be removed to federal court); note, 15 Am. & Eng. R. Cas., N. S., 374 (incorporation of railroad in another state as affecting federal jurisdiction); *Lund v. Chicago, R. I. & P. Ry. Co.* (Neb.), 14 Am. & Eng. R. Cas., N. S., 826 (where a railroad company subject to the jurisdiction of the courts of plaintiff's state and the Union Pac. Ry. Co. and its receivers, appointed by a federal court, are sued jointly in a state court, the suit is removal to a federal court); *Calvert v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 173 (adoption of foreign railroad corporation does not destroy right of removal on ground of diverse citizenship); *Allison v. Southern Ry. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 714 (effect of foreign corporation becoming domestic); *Lake St. El. R. Co. v. Ziegler* (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 1 (joinder of formal parties as affecting right to remove for diversity of citizenship); *Chesapeake & O. Ry. Co. v. Dixon* (Ky.), 14 Am. & Eng. R. Cas., N. S., 827 (joining employees as parties defendant to prevent removal to federal court); *Illinois Cent. R. Co. v. Le Blanc* (Miss.), 11 Am. & Eng. R. Cas., N. S., 838 (as it did not appear from the record that the foreign railroad company was wrongfully joined with its co-defendants (certain of its employees), it was no error to deny application for removal); *Carpenter v. Northern Pac. Co.* (U. S.), 5 Am. & Eng. R. Cas., N. S., 712 (federal receiver); *Texas & P. Ry. Co. v. Barrett* (U. S.), 11 Am. & Eng. R. Cas., N. S., 867 (right of corporation created by act of congress to remove to federal court); *Winston v. Ill. Cent. R. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 454 (right to remove cause to federal court on ground of diversity of citizenship where joinder of nonresident railroad company and its negligent res-

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railroad relative to the meeting of freight and passenger trains which was inapplicable to the case was incompetent and prejudicial, where plaintiff's attorney in his closing argument commented on the rule at length and on the alleged violation thereof, and argued that such violation was negligence.

Trial—Argument to Jury—Prejudicial Remarks.†—In an action

ident employees); *Missouri, etc., Ry. Co. v. Hickman* (U. S.), 23 Am. & Eng. R. Cas., N. S., 493 (state not real party plaintiff, so as to preclude removal of cause to federal court for diverse citizenship, in suit instituted by railroad commissioners under Mo. Rev. Stat. 1899, Sec. 1150); *Gableman v. Peoria, etc., Ry. Co.* (U. S.), 20 Am. & Eng. R. Cas., N. S., 505 (effect of mere fact that suit is against federal receivers); *Kansas City Southern Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71 (an action by a citizen and resident of the Indian Territory against a citizen of a state is not removal to the federal court on the ground of diversity of citizenship).

†For the authorities in this series on the subject of arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-note appended to *Kansas City So. Ry. Co. v. Murphy* (Ark.), 16 R. R. R. 416, 39 Am. & Eng. R. Cas., N. S., 416; *Kansas City Southern Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71 (argument not warranted by evidence); *Chicago Union Traction Co. v. Lauth* (Ill.), 17 R. R. R. 606, 40 Am. & Eng. R. Cas., N. S., 606 (immaterial, on question of error in ruling that counsel may argue on basis of right of jury to allow exemplary damages, that counsel honestly believed that the case was one in which such damages might be allowed); *West v. St. Louis S. W. Ry. Co.* (Mo.), 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855 (in an action for injury to an alighting passenger, remarks of plaintiff's counsel, to the effect that defendant's servants would have handled a car load of steers with more care than they did plaintiff, was not ground for reversal); *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149 (counsel had no right to advise jury of his intention not to ask for instructions); *Chicago & A. R. Co. v. Vipond* (Ill.), 14 R. R. R. 295, 37 Am. & Eng. R. Cas., N. S., 295 (harmless error in statements as to proper amount of damages); *Mobile, etc., R. Co. v. Bromberg* (Ala.), 14 R. R. R. 823, 37 Am. & Eng. R. Cas., N. S., 823 (refusal of court to stop argument of counsel, as to proper amount of verdict, was not reversible error); *Blackman v. West Jersey & S. R. Co.* (N. J.), 8 R. R. R. 364, 31 Am. & Eng. R. Cas., N. S., 364 (remarks of plaintiff's counsel in regard to probable consequences of injuries, not justified by evidence, ground for reversal); *Louisville, H. & St. L. Ry. Co. v. Chandler* (Ky.), 6 R. R. R. 365, 29 Am. & Eng. R. Cas., N. S., 365 (remarks of counsel tending to prejudice jury against defendant railroad company was not ground for reversal); *Greenfield v. Detroit & M. Ry. Co.* (Mich.), 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271 (statement of counsel as to settlement of claim for death resulting from same accident rendered not prejudicial by instruction); *Chicago & A. R. Co. v. McDonnell* (Ill.), 1 R. R. R. 211, 24 Am. & Eng. R. Cas., N. S., 211 (remarks of counsel tending to discredit value of instruction); note, 12 Am. & Eng. R. Cas., N. S., 205 (argument of counsel as ground for reversal); *Kansas City, etc., Ry. Co. v. McElroy* (Mo.), 22 Am. & Eng. R. Cas., N. S., 399 (remark of counsel as ground for new trial); *Masterson v. Chicago & N. W. Ry. Co.* (Wis.), 14 Am. & Eng. R. Cas., N. S., 395 (it is the duty of the trial judge to interpose with some vigor when counsel indulge in inflammatory remarks not warranted by the evidence and calculated to prejudice the jury); *Kansas City, Ft. Scott & M. R. Co. v. Sokol* (Ark.), 2 Am. & Eng. R. Cas., N. S., 148 (conduct of plaintiff's counsel, in commenting on the fact that the defendant railroad had sought a change of venue because of the feeling against it, was prejudicial error); *Rudiger v. Chicago, St. P., M. & O.*

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against a railroad for injuries to a passenger, remarks, in the closing argument for plaintiff referring to the poverty of plaintiff, the wealth of defendant, and defendant's partiality to the federal court in prefer-

Ry. Co. (Wis.), 12 Am. & Eng. R. Cas., N. S., 196 (when ground for reversal); St. Louis, etc., Ry. Co. v. Warren (Ark.), 13 Am. & Eng. R. Cas., N. S., 729 (in a personal injury action against a railroad, where the verdict is so excessive as to appear the result of prejudice or passion, caused by improper remarks of counsel not rebuked, or not sufficiently rebuked by the court, such remarks are grounds for reversal); Galveston, H. & H. R. Co. v. Bohan (Tex.), 12 Am. & Eng. R. Cas., N. S., 490 (harmless remarks of counsel as to testimony); Ranchau v. Rutland R. Co. (Vt.), 14 Am. & Eng. R. Cas., N. S., 416 (conduct of counsel in remarking that it was defendant's policy to fight every such case, etc., was reversible error); Alabama G. S. R. Co. v. Carroll (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759 (remarks of counsel to the jury on the merits of the case, to constitute reversible error, must be objected to at the time, be unwarranted by the pleadings and evidence, have a tendency to mislead or prejudice the jury, and be, to a more or less extent, approved by the trial court); Chicago, etc., R. Co. v. Mochell (Ill.), 23 Am. & Eng. R. Cas., N. S., 927 (evidence, which has gone the jury without objection, may be commented on by counsel); Georgia & A. Ry. v. Pound (Ga.), 17 Am. & Eng. R. Cas., N. S., 398 (argument of counsel not warranted by evidence); Hathaway v. Detroit, etc., Ry. Co. (Mich.), 19 Am. & Eng. R. Cas., N. S., 714 (the trial court properly prohibited an attorney from continuing to make suggestions to his associate from a distance of ten feet, while the latter was addressing the jury); Robertson v. Wabash R. Co. (Mo.), 16 Am. & Eng. R. Cas., N. S., 16 (counsel, in arguments before the jury, should not state facts not in evidence); Shaw v. Chicago & G. T. Ry. Co. (Mich.), 18 Am. & Eng. R. Cas., N. S., 131 (although plaintiff's counsel, in his argument to the jury, made an improper use of a paper sent by the defendant's attorney to its employee, alleged to have caused plaintiff's injuries, claiming it to be an admission of liability, it was proper not to disturb the verdict, as the court took pains to remove any false impression on the subject from the minds of the jury); Louisville & N. R. Co. v. York (Ala.), 23 Am. & Eng. R. Cas., N. S., 470 (arguments of counsel with respect to failure to put witnesses under rule); Illinois Cent. R. Co. v. Radford (Ky.), 23 Am. & Eng. R. Cas., N. S., 124 (failure to object to statement made in arguments of counsel); Perry v. Western North Carolina R. Co. (N. Car.), 21 Am. & Eng. R. Cas., N. S., 659 (improper remarks of counsel as ground for new trial); McCarthy v. Whitcomb (Wis.), 20 Am. & Eng. R. Cas., N. S., 860 (misconduct of counsel causing reduction of damages for injury to employee); Illinois Cent. R. Co. v. West (Ky.), 21 Am. & Eng. R. Cas., N. S., 239 (misconduct of counsel in argument, whether ground for reversal); Anderson v. Union Terminal R. Co. (Mo.), 20 Am. & Eng. R. Cas., N. S., 834 (in action for injuries to person on track, remark of counsel that defendant was a "law-breaker from the jump," did not warrant a reversal); Chamberlain v. Lake Shore & M. S. Ry. Co. (Mich.), 17 Am. & Eng. R. Cas., N. S., 241 (harmless error); Illinois Cent. R. Co. v. Josey's Adm'x (Ky.), 20 Am. & Eng. R. Cas., N. S., 869 (there can be no reversal for misconduct of counsel in argument unless the objectionable argument appears from the bill of exceptions); Louisville & N. R. Co. v. McEwan (Ky.), 17 Am. & Eng. R. Cas., N. S., 208 (remarks of counsel not ground for reversal unless objected to); Mott v. Detroit, etc., Ry. Co. (Mich.), 15 Am. & Eng. R. Cas., N. S., 113 (in an action for personal injuries, unwarranted denunciations of physicians testifying for defendant should not have been permitted in argument to jury); Schaidler v. Chicago & N. W. Ry. Co. (Wis.), 15 Am. & Eng. R. Cas., N. S., 105 (in an action for wrongful death, improper remarks of counsel, which are liable

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ence to the state court, in which the case was being tried, were improper.

Carriers—Passengers—Who Are Passengers.†—One walking on the side track of a railroad from the depot to a train on the main track in order to take passage on such train was a passenger, and not a trespasser.

Same—Passengers Boarding Trains—Contributory Negligence.§—Where a railroad is so constructed that a passenger is required to cross intervening tracks to get from the station to his train, or to leave the train, it is not negligence in itself for him not to look and listen for approaching trains on the intervening tracks; but it is incumbent on him to use such care and attention as may be usually expected of persons of ordinary prudence under like circumstances, and he may assume that the railroad will so regulate its trains that the tracks will be free from danger when passenger trains stop at a station to receive and deliver passengers.

Negligence—Actions—Question for Jury.—Where there is any evidence of negligence, the question of negligence is one for the jury.

Carriers—Injuries to Passengers—Negligence—Question for Jury.—In an action against a railroad for injuries to a passenger walking along the side track to take his train, caused by his being struck by a freight train on the side track, whether the engineer of the freight train used proper care in running his train past the station while the passenger train was receiving and discharging passengers held, under the evidence, a question for the jury.

Same—Discovered Peril—Question for Jury.—Whether the engineer exercised proper care after seeing plaintiff on the track held, under the evidence, a question for the jury.

Same—Contributory Negligence—Questions for Jury.—Whether plaintiff exercised proper care for his own safety, or brought about the injury by his own inattention, held, under the evidence, a question for the jury.

to mislead the jury when estimating damages, should be excluded from the consideration of the jury, it not being sufficient to merely declare them improper).

†For the authorities in this series on the question who are and are not, passengers, see foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *McCarter v. Greenville Traction Co.* (S. Car.), 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5; foot-note appended to *Kroeger v. Seattle Elec. Co.* (Wash.), 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689; *St. Louis, etc., Ry. Co. v. Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas. N. S., 541.

§For the authorities in this series on the subject of the duty of a passenger to lookout for danger, see *Jones v. United Rys. & Elec. Co. of Baltimore* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631 (duty of passenger on open street car to look out for danger from passing vehicles); *Chicago & E. I. R. Co. v. Huston* (Ill.), 3 R. R. R. 141, 26 Am. & Eng. R. Cas., N. S., 141 (failure to look and listen before crossing track to board car); note, 12 Am. & Eng. R. Cas., N. S., 302 (passenger crossing track at station to board train injured by passing train); *Chesapeake & O. Ry. Co. v. King* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 167 (care required of passenger crossing intervening tracks to platform); *Graven v. McLeod* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 305 (care to be exercised by passenger crossing tracks in leaving train at station); *Beecher v. Long Island R. Co.* (N. Y.), 17 Am. & Eng. R. Cas., N. S., 199 (contributory negligence of passenger crossing track at station to board train without looking and listening is for jury); *Alabama, etc., Ry. Co. v. Coggins* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 109 (right of passenger to assume that he may

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Same—Negligence—Assumptions as to Passenger's Conduct.**—An engineer of a freight train on a side track had a right to assume that a passenger walking on the side track towards a passenger train which was standing on the main track would leave the track, and was not required to give warning of the approach of his train, or to check his speed until he had reasons to believe that the passenger was not aware of the approach of the train or would not leave the track.

Same—Intoxication of Passenger.††—Intoxication of a passenger walking on a side track to take passage on his train does not affect his right to recover for injuries sustained by being struck by a freight train running on the side track, unless by reason of his intoxication he failed to exercise such care for his safety as may usually be expected of a sober person of ordinary prudence under like circumstances.

Same—Degree of Care Required.‡‡—While one walking along a railroad side track, which he has to cross to take a train standing on the main track, is a passenger, he is, nevertheless, where a passenger is not authorized to do, and cannot demand of the railroad the high degree of care due by a carrier to its passengers, and the measure of care required of operatives of a freight train on the side track is a reasonable degree of care commensurate with the danger for the safety of persons passing to and from the passenger train and the station, and in the exercise of such reasonable degree of care the operatives of the freight train should give a reasonable warning of the approach of the train, should maintain a reasonable lookout, and should run the train at a reasonable rate of speed.

Paynter and Nunn, JJ., dissenting in part.

cross tracks to station in safety a question for jury); *Kellogg v. Smith* (Mass.), 23 Am. & Eng. R. Cas., N. S., 80 (stepping from stationary car on track at switch).

**For the authorities in this series on the question whether those in charge of trains or cars have the right to assume that persons on or near tracks will avoid danger, see foot-notes appended to *Seaboard & R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *St. Louis, etc., Ry. Co. v. Evans* (Ark.), 16 R. R. R. 788, 39 Am. & Eng. R. Cas., N. S., 788; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499.

††For the authorities in this series on the subject of the contributory negligence of a person as affected by his intoxication, see foot-notes appended to *Price v. St. Louis, etc., Ry. Co.* (Ark.), 16 R. R. R. 534, 39 Am. & Eng. R. Cas., N. S., 534; *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes appended to *Stewart v. North Carolina R. Co.* (N. Car.), 16 R. R. R. 212, 39 Am. & Eng. R. Cas., N. S., 212; *Bugbee v. Union R. Co.* (R. I.), 16 R. R. R. 128, 39 Am. & Eng. R. Cas., N. S., 128.

‡‡For the authorities in this series on the subject of the degree of care due a passenger, see foot-notes appended to *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

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Appeal from Circuit Court, Grayson County.

"To be officially reported."

Action by Z. T. Proctor against the Illinois Central Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Trabue, Doolan & Cox, J. T. Wortham, and J. M. Dickinson, for appellants.

Matt O'Doherty, T. R. McBeath, and J. C. Graham, for appellee.

HOBSON, C. J. Spring Lick, in Grayson county, is a station on the Illinois Central Railroad. The railroad passenger platform is on the south side of the main track. North of the main track, and about 8 feet from it, is a side track, and north of the side track the depot is located, with a plank walk about 5 feet wide leading over from it to the passenger platform. The waiting room is in the west end of the building, and the walk runs across to it. The building is about 40 feet long. Z. T. Proctor, who lived at Leitchfield, desired to take the afternoon train home. When the train was coming, but some distance away, he heard it whistle, and went to the east end of the station, and at the window of the office asked if the agent was in. He was told that the agent was not in. He then entered into a conversation with two men he met on the platform, and sat down on a chicken coop, talking with them, until the passenger train pulled in. The engine of the passenger train stopped a little east of the station. About the time that the passenger train arrived, a freight train, which had orders to meet it there, also arrived, going west, and began pulling in on the side track at the end east of the station to make room for the passenger train to pass it. After Proctor had talked to his friends a few moments, he got up, saying that he must get on the train, and went down the steps leading from the platform on which he was sitting, and, when he reached the side track, turned and walked down in the middle of the track, evidently with a view of walking back to where the passenger coaches were and then getting on the train. While he was walking along the track, the freight train, which was getting out of the way of the passenger train, came up behind him and collided with him, cutting off one foot and injuring the other. He saw the freight train on the side track before he left his friends on the platform, but was under the impression that it had stopped some 200 feet east of the station. His friends followed him down the steps, but were a little behind him. They saw the freight train, which was so close to them when they got down the steps that they did not go upon the track. When Proctor went upon the track the freight train was about 50 or 60 feet from him, and was moving about 6 or 8 miles an hour. He could have seen the train if he had looked up then, but he did not do so. The engineer, at first supposing that Proctor was going across to the passenger train, did not pay any attention

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to him; but after he started down the track, and seemed oblivious to the train's approach behind him, the engineer began whistling. He made six or seven short blasts of the whistle, none of which Proctor regarded. Then he blew a long blast of the whistle, and just after this the engine struck Proctor. Proctor perhaps did not notice the signals given by the freight train on account of the fact that the bell of the passenger train was ringing and that engine was blowing off steam, or it may be that they made no impression on him, as he had the passenger train in mind. A number of persons about the station heard the alarm signals by the train, and saw Proctor walking down the track after these signals were given, though, of course, the whole occurrence occupied only a few seconds. According to the plaintiff's evidence he was about 5 feet west of the plank walkway when struck; but according to the defendant's evidence he was struck about 5 feet east of the walkway. The defendant's evidence tended to show he was intoxicated at the time. His evidence was to the effect that he was sober. Proctor filed suit against the railroad company and John Coche, the engineer of the freight train, to recover for his injuries. The jury found in his favor, and fixed the damages at \$7,500, and the defendants appeal.

The railroad company filed its petition for the removal of the case to the Circuit Court of the United States. The court properly overruled this motion, as there was a joint cause of action stated against the railroad company and the engineer, who was a resident of this state. See *Illinois Central Railroad Company v. Houchins*, 89 S. W. 530, 28 Ky. Law Rep. —, and cases cited.

The court on the trial allowed the plaintiff to read in evidence the following rule of the railroad company: "When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the siding and clear the train of superior class five minutes. A train of inferior class must keep five minutes off the time of a train of superior class following it." This rule was incompetent. It had no application to the facts of the case. There was an order for the two trains to meet at Spring Lick that day. The passenger train was ordered to wait there for the freight. The company which made the rule could, if it saw proper, give orders for its business to be done in a different way. Besides, the rule was simply intended to prevent collisions between trains. It did not require the freight train, when it got upon the side track, to remain in the same place. It only required it to clear the siding.

To illustrate the effect that was given the rule on the trial before the jury, we quote the following from the concluding argument of the plaintiff's attorney, which was objected to by the defendants, and was allowed over their objection: "Let us see what are the undisputed facts in this case. The first fact about which we discover there is no controversy in this case is this: That the freight train on that occasion was violating

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one of the rules of the company, that five-minute rule that under the rule of the company it ought to have been on the siding at least five minutes ahead of the time of the passenger train. What is the idea of that? It is to prevent a collision. It is to secure the safety of the public. But, says my friend Wortham, there is nothing in that. These engineers and conductors had time orders. They knew, gentlemen of the jury, before coming here, that the conduct of the engineer and conductor of that freight train would be under investigation here. They knew that we were charging that they were negligent in the management of that engine and train; and why didn't they bring that time order here? That would explain their unexpected presence at the depot at that time. Why, no. Where is the order? No. Dr. McKenney can be brought here to testify about the breath of Proctor; but that order, that would explain, perhaps, your presence on that siding at that time, they didn't think of it. It wasn't necessary. But suppose it was here. I do not say that they did not receive the order. I am perfectly willing, for the purposes of this case, to assume that they had it. If they had that order, it only brings their negligence more directly home to higher authority than to the engineer or conductor of that freight train. It fixes it upon the train dispatcher." The introduction of this rule before the jury was very prejudicial to the defendants, in view of this argument based upon it by counsel in his closing speech, which, though challenged by the defendants, was in effect sustained by the circuit court. Counsel also, in his concluding argument, said this, which was objected to by the defendants, and their objection overruled: "No verdict you can render, gentlemen, will ever sufficiently compensate him for what he has suffered. The wealth the millions upon millions owned by this defendant, if it were to be given to him, would not make good to him the loss that he has sustained. I had no stenographer to take down your speech. Poor Proctor could afford no such luxury. No, gentlemen. From your verdict there is no appeal. My friend here a moment ago almost became ecstatic in his tribute to justice, in his love of justice, and in his client's love of justice, and he represented his client and all other corporations as standing out in front of your courthouse here and asking to be admitted. That is not the way I have found it. You generally want to get away from here is my observation. There is a great big institution in Louisville, that has got a clock and a tower upon it pointing to the stars, with a very distinguished federal judge presiding in that august tribunal; and it is there where you would love to be at home, not here." Such arguments should never be allowed. They are calculated to prejudice the jury. It was immaterial, so far as Proctor was concerned, whether the freight train was late or not.

This statement of Lee Smith as to what was said by a man whom he took to be the engineer of the freight train just after the accident should have been admitted to the jury, but with the admonition that it was not to be considered by them unless the

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(Circuit Court of Appeals, Ninth Circuit, May 29, 1905.)

[138 Fed. Rep. 992.]

Parol Evidence—Construction of Contract—Time and Manner of Performance.*—Where a contract for the transportation of live stock was silent as to the time and manner of performance, parol evidence was admissible to show that it was customary to furnish an independent train for the transportation of stock amounting to 10 cars or upwards, when demanded.

Carriage of Live Stock—Action for Delay—Instructions.—In an action for damages resulting from delay in transportation of 12 cars of live stock, plaintiff testified that it was customary for the railroad to furnish independent power for the shipment of 10 cars or more, when demanded, and "we always expect it [independent power] when shipping either in or out. We collect a train load, and were entitled to a stock train. If we had ten cars or more, we generally get separate power for them." Another witness, who had been a long time in the cattle business, testified: "If we have a train load, we have power of our own. A train load is from ten cars up." Held, that such proof justified an instruction that the jury might consider the evidence relating to the question whether cattle being transported in a number greater than 10 car loads were or were not hauled by regular freight

*For the authorities in this series on the subject of the effect of customs and usages on the rights and duties of carriers, see *Midland National Bank v. Missouri Pac. Ry. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 586 (custom at place of delivery as affecting rights under the original bill of lading); *Meloche v. Chicago, M. & St. P. Ry. Co.* (Mich.), 10 Am. & Eng. R. Cas., N. S., 82 (effect of usage and custom on carrier's liabilities); *Georgia & A. Ry. Co. v. Pound* (Ga.), 17 Am. & Eng. R. Cas., N. S., 398 (sufficiency of evidence to prove custom changing carrier's liability as warehouseman); *McMillan v. American Exp. Co.* (Iowa), 10 R. R. R. 453, 33 Am. & Eng. R. Cas., N. S., 453 (contract of shipment cannot be varied by evidence of custom); *Gulf & C. R. Co. v. Fuqua & Horton* (Miss.), 12 R. R. R. 60, 35 Am. & Eng. R. Cas., N. S., 60 (termination of liability, notice to consignee of arrival of freight essential, irrespective of any custom not to give notice); *Pennsylvania R. Co. v. Naive* (Tenn.), 12 R. R. R. 126, 35 Am. & Eng. R. Cas., N. S., 126 (duty to notify consignee of arrival of freight, effect of local custom); *Stone v. Lewiston, B. & B. St. Ry.* (Me.), 14 R. R. R. 240, 37 Am. & Eng. R. Cas., N. S., 240 (custom of allowing passengers to ride on running board admissible in evidence upon question of negligence); *Carvey v. Detroit & M. R. Co.* (Mich.), 9 R. R. R. 638, 32 Am. & Eng. R. Cas., N. S., 638 (carrier could not show custom to issue certain kind of tickets for certain days only, in the absence of proof of knowledge of such custom on part of passenger); *Holt v. Hannibal & St. J. Ry. Co.* (Mo.), 8 R. R. R. 294, 31 Am. & Eng. R. Cas., N. S., 294 (admissibility of evidence of custom to issue credit slips to passengers); *International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 215 (evidence of custom to assist departing passengers tended to show that conductor knew that plaintiff boarded train to assist passenger); *Klein v. Jewett* (N. J.), 2 Am. & Eng. R. Cas., N. S., 283 (admissibility of evidence of custom of other roads in discharging passengers); *Fletcher v. Baltimore & P. R. Co.* (U. S.), 9 Am. & Eng. R. Cas., N. S., 229 (custom of throwing articles from moving trains as a defense in action for injury to passenger); *Floytrup v. Boston & Maine R. Co.* (Mass.), 2 Am. & Eng. R. Cas., N. S., 273 (admissibility of evidence of usage of company that one train

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trains, or trains gotten up specially for the purpose of transporting them.

Res Gestæ—Statements of Servants.†—In an action against a carrier for delay in transporting cattle, a statement by defendant's railroad conductor, made to plaintiff, during the transportation, in response to a question, "Why don't you get over the road?" "I can't get anywhere with this dummy. They should have known better than to send it out this kind of weather"—was admissible as *res gestæ*.

Carriage of Live Stock—Action for Delay—Instruction—Res Ipsa Loquitur.‡—Where, in an action for injuries to cattle sustained by delay in transportation, the evidence showed that 70 hours were consumed in making a trip which ordinarily could have been covered in 36 2-5 hours, it was not error for the court to charge that where defendant undertakes to transport property by means of a train which is under its management, and the accident is such as, in the ordinary course of things, does not happen if those who have the management thereof use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care, though the transportation contract provided that the carrier should not be liable for injuries to the stock unless the same were immediately caused by the misconduct or actual negligence of the carrier, its agents, servants, or employees.

Same—Separate Delays.—Where, in an action against a carrier for injuries to cattle by delay in transportation, there was evidence of several separate delays en route, and the court charged that it was plaintiff's duty to show how much of the damage, if any, sustained by the cattle was due to the causes for which defendant might be liable, and that plaintiff was not entitled to recover for damages caused by a blizzard, and could only recover such damages as resulted directly from some act or omission of the defendant which defendant should have done or omitted to do in the exercise of reasonable care, the refusal of an instruction that each of the delays must be considered by itself, and that the fact that, if the first delay had not taken place, the second might have been avoided, would not impose a liability on defendant for the second delay, as the first would not then be the proximate cause of the second, was not error.

United States Courts—Enforcement of Contract against Public Policy of State Removed from.§—Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from

should not enter station while another train is discharging passengers).

†For the authorities in this series on the question whether the declarations of agents or servants are *res gestæ*, see *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248; *South Covington & C. St. Ry. Co. v. Reigler's Adm'r* (Ky.), 15 R. R. R. 256, 38 Am. & Eng. R. Cas., N. S., 256; foot-notes appended to *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

‡For the authorities in this series on the subject of the burden of proving negligence on the part of the carrier where freight is lost or injured, see foot-notes appended to *Peterson v. Chicago, etc., R. Co.* (S. Dak.), 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

For the authorities in this series on the subject of the burden of proving that the carrier is liable for loss of or injury to freight, see foot-note appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

§See foot-note appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31.

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delay, which suit defendant removed to the federal Circuit Court sitting in Montana, such court would not enforce a stipulation in the transportation contract providing a 60-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont. § 2245, though it was not prohibited by the laws of Minnesota, where the contract was made.

In error to the Circuit Court of the United States for the District of Montana.

This is an action for damages alleged to have been sustained by the plaintiff (defendant in error) in consequence of the negligence and delay of the defendant in transporting 12 car loads of the plaintiff's cattle over its line of railroad from Winnipeg Junction, Minn., to Fallon, Mont. It is alleged that the negligent conduct of the defendant consisted in the failure to provide an independent train, with independent power, for the transportation of the plaintiff's cattle, in the negligently slow rate of speed at which the cars containing the cattle were hauled, and the negligent manner of starting and stopping the said cars, by reason whereof many cattle were bruised, crippled, made sick and sore, and otherwise injured, resulting in damages to the plaintiff in the sum of \$10,072. The defendant railway company denies any negligence on its part in transporting the cattle, and avers that the plaintiff and his agents overcrowded the cattle in loading them into the cars, and any injury sustained by said cattle was contributed to by the said crowding. It avers that it furnished an independent train with independent power, as soon as demanded, and alleges, as matter of defense, that the principal delay in hauling the train containing the plaintiff's cattle was caused by the unusually severe snowstorm and blizzard, producing conditions over which the defendant had no control. The defendant further charged that the plaintiff had no right of action upon the contract, as he had not complied with the terms thereof, in that he had not brought the action within 60 days after the alleged damage was said to have occurred, and had not given any written notice of his claim for damages to any officer or agent of the defendant before removing the said stock from the place of destination.

The plaintiff shipped 12 car loads of cattle from Winnipeg Junction, Minn., to Fallon, Mont., over defendant's line of road, under a written contract. The distance from Winnipeg Junction to Fallon is 471 miles. The train hauling the cars containing plaintiff's cattle left Winnipeg Junction May 1, 1899, at 5 p. m. It arrived at Fallon on May 4, 1899, at 3 p. m. The plaintiff testified that the usual running time for stock trains was from 15 to 25 miles an hour. At the rate of 15 miles an hour, the train should have made the distance in 36 2-5 hours, including 5 consecutive hours required by section 4386 of the Revised Statutes [U. S. Comp. St. 1901, p. 2995] for rest, water, and feeding, when the transportation of cattle is for a longer period than 28 consecutive hours. The time actually consumed in transporting the cattle to their destination was 70 hours. The 12 cars

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containing the cattle were attached to a local freight train from Winnipeg Junction to Mandan, a distance of 226 miles, at which point the cattle were unloaded by the plaintiff, cared for, and reloaded into the cars. The plaintiff there demanded a special, independent locomotive for the hauling of the cars, which was furnished, and the train proceeded independently from that point to Richardton, a distance of 86 miles, where a delay of some 11 or 12 hours occurred by reason of a severe snowstorm, and an accident to the switch which prevented the train from leaving a side track. From this point to the point of destination, 159 miles, the train appears to have proceeded without difficulty, and no complaint is made as to this portion of the service. The evidence tended to show delays at several points between Fargo and Richardton, for which the defendant company was responsible. The evidence also tended to show that plaintiff shipped 852 head of cattle from Winnipeg Junction, all in good condition. When the train arrived at Mandan, the stock was in bad condition. Two had legs broken, and 9 were dragged out of the cars because they could not be got up, on account of bruises they had received on the way, from being thrown down and crippled. The next morning at Mandan 9 of the cattle were dead, and 3 others were dying. Twelve were left at Mandan. The cattle were in very bad condition on arrival at Fallon. Forty-five more were dead, 7 more died on being taken from the cars, and 54 were left at Fallon because they could not walk. Within 10 day 122 were dead, others crippled, and still others were more or less injured.

The case was tried with a jury, resulting in a verdict for the plaintiff in the sum of \$3,000, and judgment was entered thereupon. To reverse this judgment a writ of error has been sued out to this court.

Wm. Wallace, Jr., and Charles Donnelly, for plaintiff in error.

Sidney Sanner (T. J. Walsh, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The defendant in error, as a witness in his own behalf, was asked by his counsel the following question:

"How, in the ordinary shipment of live stock, is it shipped and transported by railroads in this section generally—with single trains, or jointly and promiscuously with other freight?"

An objection to this question was overruled by the court, and the witness answered:

"Ten cars and upwards constitutes a stock train. It is customary, when asked, to give power for ten cars or upwards to the capacity of the power, and transport it as a separate train, when demanded."

It is the object of this evidence that the shipment was made

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under a special contract, which was complete in itself, and was a contract simply to transport stock; that this evidence tended to show a custom making another and a different contract for the transportation of the stock by an independent train, and it is contended that this could not be done. The objection cannot be sustained. The evidence did not tend to establish a new contract, or to change or modify the terms of the written contract. The contract was silent as to time and manner of performance, and the evidence was properly introduced to inform the court and jury as to the custom prevailing with respect to the character of transportation the parties had in view when they made the contract. The contract did not say whether the cars in which the cattle were loaded were to be attached to a through freight train or to a way freight train, of whether the cars were to be hauled as an independent train. Which of these methods was the carrier to furnish? The presumption was that the parties to the contract understood that the cattle were to be transported in the way that similar freight in similar quantities was being transported, and the evidence objected to, as well as other evidence not objected to, relating to the method of transportation, was introduced for the purpose of establishing that fact, and was admissible for that purpose. *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653. A custom or usage known to the shipper, as to the manner or method of transportation, will be binding as a part of the contract when not contrary to its terms. 6 Cyc. 428.

It was also objected that the court instructed the jury that it was entitled to take into consideration the evidence relating to the question whether cattle transported in a number greater than ten car loads were or were not hauled by regular freight trains, or trains gotten up especially for the purpose of transporting such cattle. It is contended, first, that the plaintiff was only entitled to transportation as an independent train when demanded, and it is claimed that the testimony shows that when such transportation was demanded it was furnished; and, second, that the evidence was insufficient to establish a custom that 10 cars and upwards constituted a stock train. It is true, the plaintiff testified that it was "customary, when asked, to give power for ten cars or upwards to the capacity of the power, and transport it as a separate train, when demanded." This answer, standing alone, is not very clear. But he made his meaning clear in a subsequent statement. He said: "We always expect it when shipping either in or out. We collect a train load, and were entitled to a stock train. If we had ten cars or more, we generally get separate power for them." What the witness evidently meant was that, when transportation was asked for 10 car loads or upwards, it was customary to transport the shipment as a separate train. James E. Farnham, who had been in the cattle business in Montana since 1883, and for the last 12 years had shipped most of the cattle for his company, testified: "If we have a train load, we have power of our own. A train load is from ten

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cars up." This evidence was sufficient to justify the instructions given by the court. It also disposes of the objection that the court refused to instruct the jury that no sufficient proof had been given to establish a custom under which the plaintiff was entitled to have the cattle transported as an independent train, with independent power; and it disposes of the further objection that the court refused to instruct the jury that the plaintiff, having failed to demand an independent train with independent power from Fargo to Mandan, had waived his right thereto.

The plaintiff testified that the train stopped at Richardton; he did not know why. He asked the conductor: "Why don't you get over the road?" He said: "I can't get anywhere with this dummy. They should have known better than to send it out this kind of weather." The defendant moved to strike out this answer, because, assuming he referred to the engine or power, the conductor's statement was not admissible to bind the defendant. The motion was denied, and the defendant excepted. The question at issue in the case was whether there was any unreasonable delay in moving the train containing the cattle. The defendant was charged with negligence in attaching plaintiff's cars to a train that proceeded at a slow rate of speed and stopped at many stations. The defendant denied that it had been guilty of the negligence charged. The statement of the conductor was made in the midst of the act complained of, reflecting light upon its quality and character, and under the general rule was part of the *res gestæ*. As said by Mr. Justice Cooley in *Sisson v. Cleveland R. Co.*, 14 Mich. 489, 90 Am. Dec. 252:

"The statements * * * were made while the conductor was engaged in the business of the defendants in respect to the contract in question, and had control of the train, and they related to the delay complained of, which was the *res gestæ* of the case."

The declaration of a servant while engaged in enforcing the regulations of a steamboat company concerning passengers, with respect to which complaint was made that the regulation was being enforced with unnecessary or cruel severity, was held to constitute a part of the *res gestæ*. *New Jersey Steamboat Co. v. Brackett*, 121 U. S. 637, 649, 7 Sup. Ct. 1039, 30 L. Ed. 1049. Where a railroad employee has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, were held to be admissible as part of the *res gestæ*. *Peirce v. Van Dusen*, 78 Fed. 693, 706, 24 C. C. A. 280 (Circuit Court of Appeals, Sixth Circuit, opinion by Mr. Justice Harlan). A conversation of a conductor with a passenger who expressed fear of a fellow passenger, as to the latter's sanity, being in discharge of the conductor's duty to the passenger, was held admissible as

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part of the *res gestæ* in an action against the railroad company for the killing, shortly after such conversation, of another passenger by the person whose sanity was questioned. *St. Louis, I. M. & S. Ry. Co. v. Greenthal*, 77 Fed. 150, 152, 23 C. C. A. 100 (Circuit Court of Appeals, Eighth Circuit, opinion by Judge Caldwell). These and other similar cases indicate the scope of the rule as established by the courts, under which we think the evidence was properly admitted.

The court instructed the jury that:

"Where the defendant undertakes to transport property by means of a train which is under its management or that of its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The defendant took an exception to this instruction, and contends that it is not a correct statement of the law applicable to this case, under the terms of the special contract. The contract provides that:

"The said company shall not be liable for the loss or death of, nor for any injuries received by, any of such stock, unless the same is immediately caused by the misconduct or the actual negligence of the said company or its agents, servants, or employees."

We are unable to discover how this provision of the contract changes any rule of evidence otherwise applicable to the case. The instruction was taken from the case of *Scott v. The London & St. Catherine's Dock Co.*, 3 Hurlstone & Cottman, 596. The plaintiff in that case was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant. The court said:

"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

This doctrine was held to be applicable to a common carrier in the transportation of flour in *Rintoul v. New York Cent. & H. R. Co.* (C. C.) 17 Fed. 905, 907, and is stated to be the law in *Shearman & Redfield on Negligence* (5th Ed.) § 59. We think the instruction, taken in connection with other instructions given by the court, stated correctly a rule of evidence applicable to the case.

The court refused to give the following instruction requested by the defendant:

"So, too, each of these delays must be considered by itself alone. The fact that if the first delay had not taken place the

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second one might have been avoided, would not impose a liability on the defendant for the second delay, as the first delay would not be the proximate cause of the second under such circumstances."

The defendant contends that it was entitled to this instruction by reason of an allegation contained in the complaint "that had the said cars been made into an independent train and furnished with sufficient independent power out of the city of Fargo, and, if such train had proceeded with reasonable speed, it would have arrived at the town of Fallon before the snowstorm, or before it had prevailed a sufficient length of time to cause any injury to the cattle," and the evidence of the train dispatcher, drawn out on cross-examination, that, had the train left certain points on time, delays at other points would not have occurred. It is further contended by the defendant that plaintiff's theory was that, though the delay on account of the storm was in and of itself inevitable, the defendant was responsible for its consequences, if it might not have happened but for a previous delay for which defendant was responsible, and that as this theory is in conflict with the law upon this subject as declared by the Supreme Court of the United States in *Railroad Company v. Reeves*, 10 Wall. 176, 189, 19 L. Ed. 909, and in *St. Louis, etc., Ry. v. Commercial Ins. Co.*, 139 U. S. 223, 236, 11 Sup. Ct. 554, 35 L. Ed. 154, the instruction requested should therefore have been given. It is a sufficient answer to this contention to say that, whatever may have been the theory of the plaintiff as to the liability of the defendant for a delay following a previous delay for which the defendant was responsible, the theory of the court was in accordance with the decisions of the Supreme Court, as appears from the instructions given as requested by the defendant, as follows:

"As to the blizzard and snowstorm, I instruct you that the defendant in this case is exempt from liability on account of injuries caused by freezing or by the elements, and would not be liable for any damage resulting to the cattle on account of the said storm; and you could not and ought not to award any damages against defendant because of injuries sustained by the live stock in the said storm, or in consequence thereof.

"It is the duty of the plaintiff to show how much of the damage, if any, sustained by his cattle, was due to causes for which the defendant might be liable; and if he fails to prove by any preponderance of the evidence how much of the damage, if any, sustained by his cattle, was due to causes other than the blizzard, he would have failed in his proof in this regard, and you could not render a verdict for him.

"Only those damages resulting directly from some act or omission of the defendant, which the defendant should have done or omitted to do in the exercise of reasonable care, can be recovered. None of the damages consequent upon the blizzard can be recovered. This burden of showing the exact amount of damages

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due to the causes for which the plaintiff might recover, if any such causes there were, is on the plaintiff, and you can only award a sum such as you can find from a preponderance of the evidence was due to recoverable causes as distinguished from the other causes."

It is assigned as error that upon the conclusion of the evidence the court refused to instruct the jury to find for the defendant. Among the reasons urged why this instruction should have been given is a provision of the contract—

"That no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said company, unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

The damages claimed were alleged to have been sustained between May 1, and May 4, 1899. This action was originally commenced in the district court of Montana, in and for the county of Custer, on September 5, 1899, or 122 days after the damages occurred. It is claimed by the plaintiff in error (defendant in the court below) that this limitation is not forbidden by the law of Minnesota, where the contract was made, and should be enforced. The contract was to be executed partly in Minnesota and partly in North Dakota and Montana. In the last two states the limitation is void by statutory prohibition. Rev. Codes N. D., 1899, § 3925; Civ. Code Mont. § 2245. The latter Code provides:

"Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

The delivery of the cattle was to be made in Montana. The plaintiff was a citizen of Montana, and the suit was brought in Montana. The breach of the contract occurred in North Dakota and Montana. The limitation in the contract is contrary to the policy of Montana, as expressed in its law, and could not be enforced in that state. This is an exception to the general rule that a contract valid and binding in the state where made will be enforced in another state. *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508. The rule applicable to this case is: A contract valid elsewhere will not be enforced if it is condemned by positive law, or is inconsistent with the public policy of the country, the aid of whose tribunals is invoked for the purpose of giving it effect. *Union Locomotive Exp. Co. v. Erie Ry. Co.*, 37 N. J. Law, 23; *Thompson v. Taylor* (N. J. Sup.) 46 Atl. 567; *The Kensington*, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190. This suit was brought in the state court of the state of

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Montana, and by the defendant removed to the United States Circuit Court for the District of Montana. In the state court the plaintiff was entitled to the benefit of the prohibition against the stipulation or condition in the contract limiting the time within which plaintiff might enforce his rights by legal proceedings, and the defendant could not, by removing the case to the federal court on the ground that it was a citizen of another state, deprive the complainant of such a substantive right. *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 358, 19 Sup. Ct. 179, 43 L. Ed. 474. This provision of the contract did not entitle the defendant to an instruction to the jury to find in its favor. The other grounds urged for such an instruction do not appear to have any substantial grounds, and need not be discussed.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

EVERETT *et ux.* v. NORFOLK & S. R. Co. *et al.*

(Supreme Court of North Carolina, April 11, 1905.)

[50 S. E. Rep. 557.]

Loss of Freight—Presumption of Negligence.*—The presumption, in case of loss of goods received by a carrier for transportation, is that it was through its negligence.

Same—Limiting Liability—Regulation of Corporation Commission.†—A regulation of the Corporation Commission, fixing a certain freight rate on household goods, limited to \$5 per hundredweight in value and “released,” is not intended to fix the liability of the carrier, for loss of the goods through its negligence, at less than their value.

Same—Same—Same.—The Corporation Commission, under its authority to make just and reasonable rates on freight, cannot, in consideration of a low rate, limit the liability of a carrier for loss of goods through its negligence to less than their value.

Appeal from Superior Court, Pamlico County; Ferguson, Judge.

Action by S. W. Everett and wife against the Norfolk & Southern Railroad Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Appeal by the defendants from a judgment in favor of plaintiffs, rendered at spring term, 1903, of Pamlico superior court, in a cause tried before Ferguson, J. The plaintiffs brought action for damages sustained by failure of the defendants to deliver certain packages of freight, delivered to the defendant the Norfolk & Southern Railroad Company at Elizabeth City, N. C., on

*See preceding case at foot-notes.

†As to whether the liability of a common carrier may be limited, see foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504; foot-note appended to *Ragsdale, Harper & Weathers v. Southern Ry. Co.* (Ga.), 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120.

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October 22, 1901, to be transported for hire over the lines of the defendant Norfolk & Southern Railroad Company, via Norfolk, Va., to Thomasville, N. C., on the Southern Railway. The defendants did not deny that certain parcels or packages of freight delivered to the Norfolk & Southern had not been delivered to the plaintiff on demand. Both defendants admitted that under the evidence, as it stood, each of them was liable to the plaintiff for damages, but contended that the amount was only \$30. The following facts also appeared from the record: The goods were shipped on a released bill of lading, wherein they were valued at \$5 per hundred pounds, with a freight rate approved by the Corporation Commission. The following were the approved rates on household goods, calculated by 100 pounds, to be carried 100 miles: (1) Unlimited in value and unreleased, classified as double first-class, rate 96 cents. (2) Unlimited in value but released, first-class rate 48 cents. (3) Limited in value to \$5 per hundredweight, but unreleased, first-class rate 48 cents. (4) Limited to \$5 in value and released, fourth-class rate 24 cents. The goods were shipped under the last-named classification and rate. The portion of goods lost weighed 600 pounds, which, according to the valuation specified in the bill of lading, would amount to \$30. The jury found that the goods lost were worth \$250. The question presented to the jury on the issue agreed upon was, What was the actual value of the goods lost by the defendants? The question submitted to the court under the admitted facts of the case and the verdict was, "Shall the plaintiff recover \$250, the value of the articles lost as found by the jury, or \$30, the value of the articles as specified in the bill of lading?" On the verdict, judgment was rendered in favor of the plaintiff for \$250, and the defendants excepted and appealed.

F. H. Busbee & Son, for appellants.

A. D. Ward, for appellees.

HOKE, J. (after stating the facts). It is the law of this state that a common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. In *Capehart v. Railroad*, 81 N. C. 438, 31 Am. Rep. 505, Ashe, J., commenting on several decisions as to the right of a common carrier by contract to restrict its liability, thus sums up the matter: "That a common carrier, being an insurer against all loss and damage except those occurring from the act of God and the public enemy, may, by a special notice brought to the knowledge of the owner of goods delivered for transportation or by express contract, restrict its liability as an insurer where there is no negligence on its part. (2) That a common carrier cannot, even by contract, limit its responsibility for loss or damage resulting from its want of the due exercise of ordinary care." Elsewhere in the opinion it is held, as stated, that a contract restricting liability

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as an insurer must be for valuable consideration and reasonable in its terms. The defendants having received the goods for transportation as a common carrier and failed to deliver on demand, and also admitting both loss and responsibility, the law will presume such loss attributable to the defendants' negligence. *Mitchell v. Railroad*, 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Hosiery Co. v. Railroad*, 131 N. C. 238, 42 S. E. 602; *Parker v. Railroad*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827. This presumption of the law, arising from the facts proved and admitted, is confirmed by the statement that the goods were shipped "released"; that is, released from liability against which the defendants were permitted to contract, to wit, loss occasioned otherwise than by their negligence.

We have it, then, established that the defendants, by their negligence as common carriers, caused the loss of the plaintiffs' household goods delivered to them for transportation, to the pecuniary value of \$250; that by the valuation specified in the bill of lading the amount of the loss is limited to \$30; and the question presented to the court is, for which sum shall judgment be rendered? It is the law of this state, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. *Capehart v. Railroad*, supra; *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 328. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden. *Hosiery Co. v. Railroad*, supra. In *Gardner v. Railroad*, supra, it is said: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence"—citing *Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, and numerous other decisions. It is further said: "The measure of such liability is necessarily the amount of the loss, and if the common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for a small part of the loss—it is thereby exempted pro tanto from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts and nullify the settled policy of the law." In *Moulton v. Railroad*, 31 Minn. 89, 16 N. W. 497, 47 Am. Rep. 781, it is said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for its own negligence, stands also in the way of any arbitrary pread-

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justment of the measure of damages whereby the carrier is relieved from such liability. It would, indeed, be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside by means of a contract limiting the recovery of damages to one-half or one-quarter of the known value of the property. This would be mere evasion, which would not be tolerated." In *Express Co. v. Backman*, 28 Ohio St. 156, it is said: "To permit carriers to fix a limitation for the amount of their liability for negligence, is, in effect, to permit them to exempt themselves from such liability." In *Hutchinson on Carriers*, 250, the doctrine is thus stated: "A majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants; and it is also held by a majority of the courts that a contract limiting the liability of the carrier to a certain sum in case of loss—that is, contracts designed to secure a partial exemption from liability—while valid and conclusive where the loss is occasioned by something other than the carrier's negligence, cannot be allowed where the loss was occasioned by the negligence of himself or his servant, but that in such case the owner may recover the full value of the goods."

The defendants do not seriously contend that such is not the law of this state, nor do they controvert the position that they would ordinarily be responsible for the amount of the loss established by the verdict of the jury. It is claimed by the defendants, however, that the amount of recovery against them could only be for \$30, because the value to that amount was fixed under the rating established and sanctioned by the Corporation Commission; that the defendants are compelled to take the goods at that rate, and, as they can only charge the rate, they should only be held to the valuation which is made the basis of the rate. This position is plausible, but not convincing. In the first place, it is fair to conclude that the Corporation Commission intended that this regulation should be in accordance with law, and that the valuation should only obtain in case of loss not arising from negligence. But if it were otherwise, the result would be the same. The commission is authorized to make just and reasonable rates of freight, but it has no power to change the law, nor to make a rate based upon any such idea; and if this regulation has the necessary effect of enabling the common carriers of the state, in shipments of this kind, to evade their responsibility for negligence, the conclusion is not that the law is thereby changed, but that the regulation itself is invalid. We are satisfied that in this instance both the commission and the railroads were prompted by a laudable motive to afford shippers of small means a lower freight rate. But we cannot allow such consideration in a particular case to change the rule of law that we here uphold. It is

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one in which the entire public is interested as well as the individual shipper, established and adhered to for grave and weighty reasons, and necessary for the protection of the great body of shippers. A principle so vital to the public interest should not be altered or weakened because, in a given instance, the motive is good and the particular result desirable. If this valuation entered as an essential element into the rate here contended for, and the result would enable carriers to evade the law, the rate itself is invalid, and to that extent is not a binding regulation.

There is a class of cases which permits the shipper and carrier to make an agreed valuation of goods delivered for transportation, and which, under certain circumstances in case of loss, will hold the shipper to the agreed valuation, though this be less than the actual value, and though the loss be occasioned by the carrier's negligence. In some jurisdictions, contracts of this kind are not sanctioned in respect to loss occasioned by negligence. In others, such agreements are upheld where, the carrier being without knowledge or notice as to the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate. In yet others, such agreements would seem to be upheld where the agreed valuation is known to be less than the actual value, provided the same are fairly entered into and made the basis of the shipping rate. But in none of these is the valuation relied upon in this bill of lading sanctioned or justified to the extent here claimed for it. So far as we can discover, all of them condemn an effort to limit liability for negligence by a uniform predetermined valuation arbitrarily fixed, and placed in a printed bill of lading without any reference to the actual value of the property, and without any estimate made or attempted to value the property of the particular shipment, more especially where the difference between the stipulated and actual value is so pronounced that the evident purpose and necessary effect are to practically deny recovery for negligence. The better considered authorities, as far as we recall, forbid and condemn a limitation of liability for negligence under the circumstances here described. See *Moulton v. Railroad*, supra; *Railroad v. Keener*, 93 Ga. 808, 21 S. E. 287; *Railroad v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Willock v. Railroad*, 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674; *Express Co. v. Backman*, supra. *Railroad v. Keener* was a case very much like the one we are now considering. In that case Simmons, J., in delivering the opinion of the court, said: "Where a shipper enters into an express contract with a common carrier by which he agrees, in consideration of a reduced rate of freight, that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, the contract will be upheld as to loss not involving negligence on the part of the carrier, but carriers cannot by any special contract exempt themselves from

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liability for loss occasioned by their negligence, and this is so as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability." After stating that under certain circumstances an agreed valuation will be upheld, Judge Simmons continues: "But the principle which relieves the carrier from liability for more than the agreed value does not apply where the valuation is merely arbitrary and fixed without reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there is no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of \$5 per hundred pounds for wearing apparel and household goods, indiscriminately, could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier without regard to the actual value of the property, and it follows from what we have said that it was inoperative for that purpose if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence."

It is not claimed here that the carrier was misled or deceived in any way as to the kind or value of these goods. There is neither allegation nor issue addressed to any such question, and, as we understand it, the defendants did not intend or desire to raise it. Some of the goods lost were perhaps not correctly classified as household goods, but the amount properly described as household goods was more than sufficient to justify the verdict. As a matter of fact, no inquiry was made about the value of the goods, and no statement made concerning them one way or the other. The agent just classified them at the established rate and uniform valuation provided for by the regulation and printed in the bill of lading, and no effort was made to estimate or put any value on the goods of this particular shipment. The defendants rest their defense, and, as we understand, desired to rest it, on the sole ground that they received the goods at a rate and on a valuation established and sanctioned by the Corporation Commission, and claim that by virtue of such regulation the recovery is limited to \$5 per hundred pounds, amounting in the goods lost to \$30. We declare our opinion to be that the valuation does not restrict the liability of the carriers for losses arising from their negligence, and that the rules of the Corporation Commission could give it no such effect, even if so intended. The plaintiff is entitled to recover the full amount of his loss as declared by the verdict of the jury.

The judgment of the court below is affirmed.

CHICAGO, I. & L. RY. CO. *v.* REYMAN.

(Supreme Court of Indiana, March 7, 1906.)

[76 N. E. Rep. 970.]

Appeal—Transcript—Authenticity—Sufficiency.—The clerk of W. county, on the transfer of a cause to O. county, copied the pleadings into his transcript. The two paragraphs of the complaint were not copied into the record by the clerk of O. county as original papers deposited with him with the transcript, but he certified that the transcript contained a true copy of the papers in the cause. Held, that the clerk's certificate must be assumed to certify both of the paragraphs of the complaint as set out in the transcript prepared by the clerk of W. county, enabling the court on appeal to determine the sufficiency of the evidence to uphold the result.

Carriers—Damage to Fruit—Liability of Carrier.*—Where a shipper of fruit undertook to supply the refrigerator car with ice, and the carrier's liability for damage to the fruit in consequence of the heat must, by virtue of the contract of shipment, be predicated on negligence, an injury to the fruit in consequence of the heat must, in the absence of evidence showing a default on the carrier's part, be assumed to result from the shipper's failure to supply sufficient ice for the car.

On petition for rehearing. Transferred from Appellate Court, under section 1337u, Burns' Ann. St. 1901. Granted.

For former opinion, see 73 N. E. 587.

GILLET, C. J. This action was commenced in the Washington circuit court, and it was sent on change of venue to the court below. There was a trial by the court, which resulted in a finding and a judgment for appellee.

Appellee's counsel contend that the case must be affirmed for the assigned reason that the two paragraphs of complaint set out in the transcript are not in the record; citing *Consolidated Stone Co. v. Staggs*, 164 Ind. 331, 73 N. E. 695. The basis of the objection to the record lies in the fact that said paragraphs were not copied into the record by the clerk of the court below, as they should have been, as original papers deposited with him, with the transcript. This was evidently due to the fact that the clerk of the Washington circuit court had unnecessarily copied said pleadings into his transcript. The clerk of the court below has certified that the transcript "contains a full, true, and complete copy of all papers and entries in said cause." This certificate could not be true, except as we assume that said clerk has, in effect, certified to the authenticity of one or both of said paragraphs of complaint, as set out in the transcript which was prepared in the county in which the action originated. Whether one or both of said paragraphs are authentic we may not be able to determine from said certificate, but it is sufficient to inform us that the paragraph or paragraphs on which the case was tried appears in the record. Appellant's answer, which was by way of general denial, was filed in the court below. These facts,

*See preceding case and foot-notes.

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without any more precise information, are sufficient to enable us to determine whether the evidence most favorable to appellee was sufficient to uphold the result. The case is distinguishable from Consolidated Stone Co. *v.* Staggs, *supra*, and is within the principle of Southern Ind. R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886, Perry Stone Co. *v.* Wilson, 160 Ind. 435, 67 N. E. 183, and Board *v.* Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780. Appellant raises a number of objections to said paragraphs of complaint; but, in view of the condition of the record and of the fact that the cause must be reversed on the evidence, so that objections may be obviated by amendment, we have concluded not to pass upon such questions, aside from such incidental discussion as appears hereafter.

The first paragraph of the complaint is founded on bills of lading, and the second charges negligence upon part of appellant as a common carrier of goods. It appears from the evidence that the shipment which gave rise to the case before us consisted of peaches and apples, and the contract of the parties was evidenced by a bill of lading. At the time of said transaction, August 30, 1901, appellant furnished to appellee and a third person a refrigerator car, belonging to Swift & Company, of Chicago, for use on its homeward trip in shipping said fruit to Chicago. The consignment was made to a commission firm of said city, to sell for the consignors. Appellant had no refrigerator car service between Salem, Ind. (the place of shipment), and Chicago, and had no facilities for supplying such cars with ice. As the car furnished had been used on its outward trip for the distribution of fresh meat, it was cool, or partially cool, when said shippers received it, and there was some ice in the tanks of the car at that time. The shippers put in enough ice to make altogether between 600 and 700 pounds. The car was to leave that night (Friday), and would be due in Chicago at 3:40 Sunday morning. The shippers made no inquiry as to the schedule or as to the probable time of delivery. It was their supposition that the car would reach its destination some time Sunday, and they put in enough ice, as they testified, to keep the car cool until it reached Chicago. The car is shown to have arrived at appellant's yards, which are situate in the neighborhood of Forty-Eighth and Forty-Ninth streets in said city, at 4 a. m. Sunday morning. At this point the cars of said train were left by the regular crew, it being the custom for a switching crew, in the employ of appellant, to distribute from this point the cars of incoming trains. From the time that the car reached the yards until about 8:30 a. m. Monday there is a hiatus in the evidence. At the time last mentioned it appears that the car was standing on a teaming track, and the consignee's driver was on hand to unload the fruit. He opened the car, and found that the ice had melted and that the fruit was seriously injured from heat. It does not appear what the usage of the commission trade was with reference to unloading fruit on Sunday, and, as indicated, there is nothing to show when the car reached the teaming track.

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Appellant claims an exemption of liability on account of an injury by heat, by virtue of condition No. 1 in its bill of lading. However, the nature of the service and the other attending circumstances gave rise to an implication that appellant would not negligently permit the fruit to be spoiled by the heat in the event that actual delivery should be delayed beyond the usual time. Note to Marks v. New Orleans Cold Storage Co., 90 Am. St. Rep. 300. We are of opinion that said provision was not sufficient to protect appellant as against a charge of negligence. If it was the usage of the trade to receive delivery and unload cars while they were standing in some safe and convenient place for unloading, the location of the car at that point and a readiness upon the part of the company to permit the consignee to take possession might end the contract of carriage, even without notice to the consignee. Bansemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140; Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423; Gregg v. Illinois Central R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238. But even after that appellant would have something more than a bare charge. The difficulty about this case is that there is no proof of any delay in the car reaching the teaming track, or that there was any delay, beyond the usual time, upon the part of the consignee in accepting delivery. The shippers having undertaken to supply the car with ice, appellant had a right to assume, in the absence of notice to the contrary, that they had furnished enough ice to keep the car cool until a delivery to the consignee could, in the ordinary course of business, be had. In view of its contract, appellant's liability had to be predicated upon negligence, and in the absence of a showing of some default upon its part it can only be assumed that the injury to the fruit was due to the failure of the shippers sufficiently to ice the car. See 6 Cyc. 522.

The judgment is reversed and a new trial ordered. Appellee is authorized to file an amended complaint.

LEHMAN, STERN & Co., Limited, v. MORGAN'S LOUISIANA & TEXAS R. & S. S. Co.

(Supreme Court of Louisiana, May 8, 1905. On Rehearing, June 28, 1905.)

[38 So. Rep. 873.]

Carriers—Loss by Fire—Liabilities—Statute.—While common carriers are not considered, under the provision of the Civil Code of Louisiana, as insurers against loss or damage by fire, they are liable, "unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events." Rev. Civ. Code 1870, art. 2754.

Same—Same—Same—Burden of Proof.*—Where cotton on a railroad platform, in course of delivery, was damaged by fire, the cause

*See preceding case and foot-note.

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of which is not shown or explained, proof of the usual and ordinary diligence in such cases to safeguard the cotton will not avail the carrier as a defense. Besides proof of loss and diligence, the law requires the carrier to prove that the fire was purely accidental, and impossible to prevent. This necessarily involves proof of the cause or origin of the fire, and in the absence of such proof the loss will be imputed to the fault of the carrier.

(Syllabus by the Court.)

Action by Lehman, Stern & Co., Limited, against Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for defendant was affirmed by the Court of Appeal, and plaintiff applies for certiorari or writ of review. Reversed.

Solomon Wolff, for applicant.

Denegre & Blair and *Victor Leovy*, for respondent.

LAND, J. Plaintiff sued to recover the sum of \$140.24 damages by fire and water on 33 bales of cotton when delivered by defendant company to plaintiff, as consignee, under bills of lading, attached to the petition. The plaintiff did not allege that the damage was occasioned by negligence on the part of the carrier, and the cause of action set forth was therefore the failure of the defendant company to deliver the cotton in good condition.

Defendant filed an exception of no cause of action, predicated on the absence of allegations of negligence.

This exception was tried and overruled, and thereupon the defendant answered, and the cause was tried on the merits.

The district judge rendered judgment in favor of the defendant, and on appeal the judgment was affirmed by the Court of Appeal, one of the judges dissenting. The cause was brought before this court by writ of review. The district judge found that there was no negligence on the part of the defendant.

We make the following excerpt from his opinion, to wit:

"The presumptive negligence on the part of the defendant has been destroyed by the positive evidence given by it that ordinary care and attention usually given by diligent men on like occasions were exercised by it on this occasion. The cotton was placed in the usual safe place for freight; it was covered by tarpaulins, and a watchman was placed in charge of it."

"The cotton could not have been ignited by sparks passing from locomotives belonging to defendant, for none passed the cotton except those which were equipped with spark arresters; and no one except employees of plaintiff and defendant were near, or had been near, the cotton when the fire occurred."

The case is thus stated by the Court of Appeal:

"The plaintiff claims damages for certain cotton destroyed by fire, which was transported hither from Shreveport by the defendant, and which was in course of delivery when the accident occurred.

"It is conceded that the amount claimed correctly represented the loss, but liability is denied on the ground that the railroad company used due diligence in protecting the cotton, and is

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therefore not responsible for loss. * * * The question now tendered is whether the carrier must show, under the jurisprudence, exactly how the damage occurred, and specifically trace it to some particular accident or uncontrollable event, or whether he is exonerated by proof of due diligence on his part."

After reviewing the jurisprudence of this state, the Court of Appeal held that a carrier is not an insurer as at common law, but his responsibility must be considered as that of a bailee for hire, answerable for ordinary neglect.

The court cited *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, and *Maxwell & Putnam v. R. R. Co.*, 48 La. Ann. 385, 19 South. 287, as supporting its ruling, and the latter as, in effect, overruling *Brousseau v. Ship Hudson*, 11 La. Ann. 428. Moore, J., dissented, holding that the responsibility of the common carrier for loss or damage of the thing intrusted to him is the same under the civil law as it is at common law.

Article 2754 of the Revised Civil Code of 1870 reads as follows:

"Carriers and watermen are liable for loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events."

Article 2725 of the Civil Code of 1825 reads "may be liable," and it appears that the words "accidental or uncontrollable events," were used as the equivalents of "cas fortuit ou force majeure" of the French text of the same article.

The Civil Code of 1808, p. 384, article 63, reads "accidental or uncontrollable events," while the Codes of 1825 and 1870 read "accidental and uncontrollable events."

The "cas fortuit," or "fortuitous event," as defined by the Code of 1825, is that which happens by a cause or force which we cannot resist; and "force majeure," or "superior force," is an accident which human prudence can neither foresee nor prevent.

The case of *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, was decided in 1819, under the Code of 1808. In that case a steamboat was destroyed by fire while under way, and the evidence showed that no negligence could be attributed to those who were concerned in the navigation of the boat. The court said, speaking of carriers:

"They are excused by accident or overpowering force—cas fortuit ou force majeure—wherever the first does not occur by their negligence, and they do not unnecessarily go in the way of the latter;" and that in case of accidents "the carrier is bound to show that they happened without any fault or negligence on his part, which, being a negative proposition, can only be established by evidence of the ordinary care and attention usually given by diligent men on like occasions."

In *Brousseau & Co. v. Ship Hudson*, 11 La. Ann. 427, decided in 1856, goods shipped at New York for New Orleans were damaged in transit by the bursting of four casks of chloride of

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lime in the hold of the vessel. The court held that the defendant was responsible for the loss, though not chargeable with negligence, and said:

"Under our Code common carriers are liable for the loss or damage of the things intrusted to their care, unless it be shown by them that such loss or damage was occasioned by accidental and uncontrollable events. (Par cas fortuit, ou force majeure.) Article 2725; I. R. R. 410. The term 'vis major' (superior force) is used in the civil law in the same way that the words 'act of God' are used in the common law, and so also is the term 'casus fortuitus.'

"By the act of God is meant inevitable accident or casualty."

The court quoted the following extract from Story on Bailments, to wit:

"By 'inevitable accident' is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, by perils of the seas, by an inundation or earthquake, or by sudden death or illness. By 'irresistible force' is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable."

The court further said:

"Hemp taking fire in a state of effervescence may be mentioned as an instance of loss which is not attributable to a cas fortuit."

This case was cited with approval in *Cranwell v. Ship F. Fosdick*, 15 La. Ann. 437, 77 Am. Dec. 190, and in *Pitre v. Offutt*, 21 La. Ann. 679, 99 Am. Dec. 749, which, however, did not involve the same issue.

In article 1927 (article 1933 of the Code of 1870) it is provided that the debtor will be excused from delivering the object of the contract if it be lost "by some fortuitous event or irresistible force"—"par quelque cas fortuit ou de force majeure" in the French Code of 1825.

In *Engster & Co. v. West & Co.*, 35 La. Ann. 121, 48 Am. Rep. 232, the court said:

"The pandectes Francaises teach that 'on entend par cas fortuit les accidens qu'on n'a pu ni prévoir ni empêcher.' So Emerigon on Insurance, 285, by 'accident (cas fortuit)' is meant a superior force which cannot be foreseen nor resisted. In its legal sense, 'fortuitous event' is synonymous with 'act of God' of the common law."

In the case of *Darrall v. Southern Pacific Company*, 47 La. Ann. 1455, 17 South. 884, the defendant used barges to convey sugar from plantations to its railroad, and one of these barges laden with sugar sank by coming in collision with piles or fenders placed by defendant in Berwick's Bay to protect its railroad bridge. Plaintiff sought to make the company liable for the value of his sugar lost by reason of the barge. The court rendered judgment in favor of the plaintiff on account of defendant's want of due care in the location and construction of the protection for its bridge. In the opinion it is stated *arguendo*

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"that our Code does not impose on carriers the responsibility incident to the relation under the common law." Rev. Civ. Code 1870, arts. 2751, 2754. The case went off, however, on a question of negligence not involving a fortuitous event.

The decision of the district court and its affirmance by the Court of Appeals were based on *Maxwell & Putnam v. Southern Pacific Railroad Company*, 58 La. Ann. 385, 19 South. 287. In that case 110 bales of cotton were destroyed by fire while in possession of defendant at its depot awaiting transportation, and it was alleged that the loss happened through the fault, negligence, carelessness, and unlawful acts of defendant. One of the stipulations of the bills of lading was that the carrier should not be responsible for loss or damage caused by fire not due to the company's negligence. The court recognized the validity of such a limitation of liability by contract, but decided the case against the defendant on the ground that the loss was occasioned through the fault or ordinary negligence of the servants of the company.

In that case the organ of the court cited *Hunt v. Morris*, 6 Mart. (O. S.) 676, where the loss was charged to the "negligence and misconduct of the master and those employed under him"; also the *Darrall Case*, 47 La. Ann. 1455, 17 South. 884, and a number of common-law authorities. But no reference was made to *Brousseau v. Ship Hudson*, 11 La. Ann. 427, nor was the question of the liability of the company under Civ. Code, art. 2754, discussed.

The only two cases which really passed on the question before us are the *Brousseau Case*, decided under the Code of 1825, and the case of *Hunt v. Morris*, decided under the Code of 1808.

We have already noticed the difference between the provisions of the two Codes relative to the liability of carriers. The Code of 1808 excused the carrier on proof that the loss or damages was occasioned by "accidental or uncontrollable events." In the Code of 1825 "and" was substituted for "or," so as to read "accidental and uncontrollable events."

Article 2722 of the Code of 1825 provided that carriers should be subject, "with respect to the safe-keeping and preservation of things intrusted to them," to the same duties and obligations of innkeepers, who were made responsible for the effects of travelers damaged or stolen, except when stolen by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence. Having thus provided for loss or damage that might be occasioned by violence or human agency, the authors of the Code further provided that carriers should be liable for loss or damage of things intrusted to their care unless they can prove that such loss or damage has been occasioned by "accidental and uncontrollable events." The French text reads, "Par cas fortuit ou force majeure." In the Code of 1825 "cas fortuit" is translated "fortuitous event," and "force majeure"

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is the equivalent of "irresistible force." Article 1927. Both terms indicate events caused by a force which cannot be resisted. Article 3522, Nos. 7 and 19. The word "accident" per se means an unforeseen and unexpected event, and the word "uncontrollable" further qualifies the event as one which cannot be restrained or prevented. Article 2725 of the Code of 1825 corresponds with article 1784 of the Code Napoleon. Under the latter article it is held uniformly in France that destruction by fire (incendie) is not in itself a fortuitous event (cas fortuit). Laurent, Droit Civil Francais, Tome 25, No. 523. The court of cassation in such cases has formulated the following principles:

"Il ne suffit pas au voiturier, pour degager sa responsabilite, d'etablir que la marchandise a lui confiee a peri; il doit prouver encore qu'elle a peri par un cas purement fortuit, impossible a prevenir, et qu'il n'a a se reprocher aucun fait d'imprudence ou de negligence." Laurent, Id.

The above quotation may be freely translated as follows:

"The carrier cannot escape liability by merely proving that the merchandise intrusted to him has been lost or destroyed, but he must prove further that it has been lost or destroyed by an event purely accidental, impossible to prevent, and that he is not chargeable with any act of imprudence or of negligence."

The carrier must prove the precise cause of the loss. It will not suffice to prove merely due diligence, but the carrier must prove, moreover, that the accident was occasioned by a fortuitous event, or by irresistible force, or by a defect of the thing itself, or by a fault of the shipper. Fuzier-Herman, Code Civil, vol. 4, p. 419, No. 1.

We are of opinion that the term "accidental and uncontrollable events," as used in article 2754 of our present Civil Code, is the equivalent of "cas fortuit ou force majeure" of the French text of article 2725 of the Code of 1825. In the civil law loss by fire is not considered a fortuitous event, as it arises almost invariably from some act of man. At common law the carrier is considered as in the nature of an insurer against loss by fire, unless it be caused by lightning. Hutchinson on Carriers, 182. The civil law does not go to this extent, but it does require the carrier to prove the precise cause of the fire, that it was impossible for human prudence to foresee or prevent the loss, and that no act of imprudence or negligence is chargeable to the carrier.

In the case at bar the origin or cause of the fire was not shown. While on the platform in course of delivery, fire suddenly broke out in the cotton. The cause of the fire was either unknown or unexplained. Evidence that the defendant company had a watchman present, that the cotton was covered with tarpaulins, and that its locomotives had spark arresters, will not suffice to prove that the loss was the result of "an accidental and uncontrollable event." Unless the court is informed as to the particular cause or origin of the fire, it cannot determine the nature and

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character of the event. Where the cause of the fire is unknown or unexplained, there is no proof of loss by an event which could not be prevented or resisted.

Both courts decided the case on the theory that loss by fire was not within the limitations and exceptions of the bills of lading. This must be so, as "fire" was stricken out, both as an excepted risk and cause of loss or damage, before the bills were issued.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal and of the district court herein rendered be annulled, avoided, and reversed, and it is now ordered and decreed that plaintiffs do have and recover of the defendant company the sum of \$140.24, with legal interest thereon from judicial demand, and costs of suit in all courts.

On Rehearing.

PER CURIAM. Rehearing denied.

SOUTHERN EXPRESS CO. v. R. M. ROSE CO.

(Supreme Court of Georgia, Jan. 9, 1906.)

[53 S. E. Rep. 185.]

Carriers—Duty to Transport Goods—Enforcement.*—A corporation engaged in business as a common carrier is bound to receive all goods offered it for transportation, which it is able and accustomed to carry, upon compliance with such reasonable regulations as it may adopt for its own safety and the benefit of the public; and a private party may, by mandamus, enforce the performance of this public duty by such common carrier as to matters in which such party has a special interest.

Mandamus—Special Interest of Relator.*—A merchant, located and carrying on business in the city of Atlanta, and who has been accustomed for many years to sell therein the goods in which he deals to persons residing in Lawrenceville, upon orders received from them by mail, and to ship the goods to such persons by express, has such a special interest in the performance by an express company, operating a line of transportation between such cities, of its public duty relatively to packages containing goods, such as it is able and accustomed to carry, which he has sold to customers residing in Lawrenceville, and which he, under the reasonable regulations of such common carrier, offers to it for shipment and delivery to the owners of such

*For the authorities in this series on the subject of the duty of common carriers to receive and carry freight, see foot-note appended to *Bedford-Bowling Green Stone Co. v. Oman* (Ky.), 8 R. R. R. 249, 31 Am. & Eng. R. Cas., N. S., 249; *Memphis News-Pub. Co. v. Southern Ry. Co.* (Tenn.), 8 R. R. R. 202, 31 Am. & Eng. R. Cas., N. S., 202.

For the authorities in this series on the question whether mandamus or injunction is the proper remedy where it is sought to compel a common carrier to receive and carry freight, see extensive note, 1 R. R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134; foot-note appended to *Loraine v. Pittsburg, etc., R. Co.* (Pa.), 9 R. R. R. 306, 32 Am. Eng. R. Cas., N. S., 306 (remedies to compel carrier to furnish facilities).

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goods, as entitles him to the writ of mandamus to compel such express company to accept, transport, and deliver such goods, when it, without lawful excuse, refuses to do so.

Municipal Corporations—Charter Powers—Licensing Carriers.—The municipal ordinance of the city of Lawrenceville which declares it to be unlawful for any railroad or express company, or any other person or persons, to deliver or cause to be delivered, in such city, any package containing wine, whiskey, beer, or any other intoxicating liquors, "without first paying into the treasury of said city the sum of \$1,000 per annum as a license for carrying on said business in said city," and which prescribes a penalty for its violation, is void, as the mayor and council of the city had no power, under its charter, to enact such ordinance.

Carriers—Duty to Carry Goods—Enforcement—Mandamus—Defenses.*—A common carrier, able and accustomed to transport such goods from Atlanta to Lawrenceville and to deliver the same to the consignees thereof in the latter city, cannot lawfully refuse to do so merely because of the passage of such invalid municipal ordinance. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mandamus proceeding by the R. M. Rose Company against the Southern Express Company. The writ was granted, and defendant brings error. Affirmed.

On the 16th day of March, 1905, the mayor and council of the city of Lawrenceville passed the following ordinance: "Be it ordained by the mayor and council of the city of Lawrenceville, Ga., that it shall be unlawful for any railroad company, any express company, or any other person or persons to deliver or cause to be delivered any package in the city of Lawrenceville, Ga., containing wine, whisky, beer, or any other intoxicating liquors or whisky, without first paying into the treasury of said city the sum of \$1,000 per annum as a license for carrying on said business in said city. Any person or persons engaged in this business, failing or refusing to pay said license, shall, upon conviction thereof, be punished as prescribed in Ordinance No. 1 of the by-laws of said city. Each day in which said business is carried on, without a license, shall be held to constitute a new offense. This ordinance to take effect on the 25th day of March, 1905. By order of the city council of Lawrenceville, Ga., this the 16th day of March, 1905." Ordinance No. 1, herein referred to, defined disorderly conduct within the city and prescribed the punishment for the same. On March 25, 1905, the R. M. Rose Company, a corporation engaged in the wholesale liquor business in the city of Atlanta, received by mail, from J. L. Exum, of Lawrenceville, Ga., an order for one gallon of whisky of a designated brand. Accompanying this order was an express money order in full payment for the whisky. Thereupon the R. M. Rose Company put a gallon of whisky in a jug, which was properly sealed and directed to J. L. Exum, at Lawrenceville, Ga., and this jug was taken by its agent to the office of the Southern Express Company in the city of Atlanta, and

*See foot-note on preceding page.

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there tendered to the agent of the express company for shipment and delivery to Exum at Lawrenceville; the agent of R. M. Rose Company at the same time offering to prepay the express charges on the package. The agent of the express company refused to receive the jug of whisky for shipment to Lawrenceville, and stated that he would not receive any other such shipment until the ordinance of the city of Lawrenceville relative to the matter should be repealed. The Atlanta agent of the express company was acting in accordance with the following instructions from the express company: "Southern Express Company. Office of Second Vice President. Chattanooga, Tenn., March 22, 1905. The city of Lawrenceville, Ga., has passed an ordinance imposing a tax of \$1,000 on any railroad company, express company, or any one else delivering intoxicating liquors within the corporate limits of the city. All agents in Georgia are hereby instructed not to accept such shipments for Lawrenceville until further notice. Charles L. Loop, Second Vice President."

The R. M. Rose Company then brought, in the superior court of Fulton county, a petition for a mandamus to compel the Southern Express Company to receive, transport, and deliver the jug of whisky to the consignee in Lawrenceville, and to compel it to receive from the petitioner, upon its receiving its fair charges thereof, packages containing wine, beer, and other liquors, when properly packed under the rules and regulations of the express company, for transportation to Lawrenceville, and to there deliver the same to the parties to whom such packages should be consigned. Under this petition, the judge granted a mandamus, nisi, requiring the express company to show cause why a mandamus absolute should not be granted as prayed for. The answer of the express company raised certain issues of fact as well as issues of law, and, when the case came on for trial in term, by consent of counsel, both the questions of fact and the question of law were submitted to the judge for determination; the right of either party to except to the judgment and carry the case to the Supreme Court being reserved. Upon the trial the facts alleged in the petition to have occurred were established, and the express company, in support of the defense set up in its answer, showed the existence of the municipal ordinance above set forth, contended that the ordinance was, in effect, prohibitory, and that so long as the ordinance was in force it had the right to refuse to accept any package of intoxicating liquor for shipment to and delivery in Lawrenceville. It also made certain other legal contentions which are sufficiently indicated in the opinion. The trial resulted in the grant of a mandamus absolute, requiring the express company to receive the jug of whisky in question, upon the payment of the express charges, and to transport the same to the city of Lawrenceville, and there deliver it to the consignee, Exum, and also to receive, at its public offices in the city of Atlanta, from the plaintiff, all other packages of intoxicating liquors, when properly packed

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and directed, under the reasonable rules and regulations of the express company, and when delivered on straight shipments as opposed to collect on delivery shipments, and transport the same to the city of Lawrenceville and there deliver them to the consignees thereof. The express company excepted to this judgment, and the case is accordingly before us for review.

C. H. Brand and Du Bignon & Alston, for plaintiff in error.
Rosser & Brandon, for defendant in error.

FISH, C. J. (after stating the facts). (1) One of the contentions of the express company is, that the applicant for the writ of mandamus had an adequate and complete remedy at law by an action for damages, without resorting to the extraordinary writ of mandamus, and therefore the writ should have been denied. In support of this contention, the plaintiff in error cites *Hutchinson on Carriers*, § 115b, to the effect that: "If the carrier refuses without lawful reason to accept and carry goods, the owner may maintain an action against the carrier for the damages sustained by such wrongful refusal. This remedy by action is usually adequate to secure the plaintiff's rights, and therefore, in accordance with well-settled principles, mandamus will not lie to enforce the performance of the duty." In the same section, however, this author says: "Where the duty was expressly imposed by state statute and by the United States interstate commerce act, and the refusal was continuing and the injury irreparable, a mandatory injunction was granted to secure performance"—citing *Chicago Railway Co. v. Burlington Railway Co.* (C. C.) 34 Fed. 481. We are of the opinion that, even under the rule as laid down by this author, the judge below properly held that mandamus would lie in the present case. For, as we shall presently see, the duty of the express company which the petitioner sought to enforce by mandamus is one which, in this state, is expressly imposed by statute, we think it is obvious, from the evidence, that the damages which would ensue to the petitioner by the continued refusal of the express company to transport intoxicating liquors from Atlanta to Lawrenceville would be incapable of being ascertained.

But it is clear, however, that the general rule laid down by *Hutchinson* is not applicable in this state. Section 2278 of the Civil Code of 1895 provides: "A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public." Here we have a public duty of the common carrier defined and imposed by statute. Section 4869 provides: "A private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest." Here the right to enforce, by mandamus, the performance of this public duty by a corporation is given to a private party having a special

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interest in the matter, and this right is clearly not dependent upon his being without adequate remedy by a suit for damages for its nonperformance in his behalf. He has the right to compel the performance of the public duty, and is not compelled to seek redress in damages for its nonperformance at his instance. The defendant admitted that it was chartered under the laws of this state as an express company. "An express company which pursues continuously, for any period of time, the business of transporting goods, packages, etc., is a common carrier." *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Kirby v. Adams Express Co.*, 2 Mo. App. 369. In the present case, therefore, the respondent was under the public duty of receiving and transporting all goods, which it was able and accustomed to carry, which were offered to it for transportation, upon compliance by the intending shippers with its reasonable rules and regulations. It admitted in its answer that it was "engaged in transporting liquors, wines, and beers, when properly packed, from stations on its line to other stations on its line, when not prohibited by law," and "that up to the 25th day of March, 1905, it was engaged in transporting from stations on its line to Lawrenceville, Guinnett county, Ga., for such persons as should so demand its services, packages of liquors, wines, and beer, when properly packed and when delivered on straight shipments as opposed to collect on delivery shipments," and "that it was up to said date engaged in the business of accepting from the said R. M. Rose Company packages of wines, beer, and liquors at its place of business in the city of Atlanta, Ga., for shipments in the manner above described to Lawrenceville, Ga. It is obvious, therefore, that the writ of mandamus absolute was properly granted, unless some other contention of the express company is meritorious.

2. Another contention of the express company is that if the writ of mandamus would lie at all, Exum, who had purchased the liquor from R. M. Rose Company and paid for it, and to whom, therefore, it belonged when that company offered it to the express company for shipment to Lawrenceville, was the proper party to apply for the writ, and the only one in whose behalf it could be issued. We think this contention is fully answered by the mere reading of section 4869 of the Civil Code of 1895, which is quoted above. It seems very evident to us that a wholesale liquor dealer, located in Atlanta, which, as the evidence shows, had been for many years engaged in selling, in Atlanta, liquors to persons living in Lawrenceville and vicinity, upon orders therefor received by mail, and shipping the goods to the purchasers at Lawrenceville by express, has a special interest in seeing that the express company shall perform its duty by accepting from such dealer shipments of liquors to its customers in Lawrenceville and transporting and delivering the same to the

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consignees thereof. Its interest in the matter is far greater than that of any one of its Lawrenceville customers, because its business dealings with people living in Lawrenceville and vicinity would be greatly restricted and diminished if it was denied the right to ship its goods by express to its customers at Lawrenceville. And if such a right could be lawfully denied to the petitioner by the express company, it could, for like reasons, be denied to the petitioner by a railroad company, so that the petitioner would be practically without the means of shipping its goods to Lawrenceville.

3, 4. Coming down to the merits of the case itself, the defense set up by the express company was that it had not paid the license tax required by the above-quoted municipal ordinance for delivering or causing to be delivered, in the city of Lawrenceville, any package containing wine, whisky, beer, or other intoxicating liquor, and it would therefore subject itself to prosecution and punishment by undertaking to transport such liquors to Lawrenceville and there deliver them to the consignees thereof. It further contended that the ordinance requiring the payment of \$1,000 for a license to deliver intoxicating liquors in Lawrenceville was in effect prohibitive, and was so intended, and that upon the trial it was admitted that the gross sum received by the express company for the shipping of intoxicants to Lawrenceville for one year is \$469.50. There was no merit in this defense, as in our opinion the municipal ordinance in question is invalid, as the mayor and council of the city of Lawrenceville had no power under the charter of the city to pass it. Authority to enact this ordinance is claimed under each of several sections of the city's charter, which is found in Acts 1904, p. 489 et seq. One of these is section 1, wherein it is provided that the city "may sue and be sued, contract and be contracted with, plead and be impleaded, have and use a common seal, make and enact, through its mayor and council, such ordinances, rules, regulations and resolutions for the transaction of its business and the welfare and proper government of said city as the mayor and council may deem best, and which shall be consistent with the laws of the state of Georgia, and the United States." Another is section 32 (page 500), which provides "that the mayor and council of said city shall have full power and authority to pass all by-laws and ordinances for the prevention and punishment of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen or citizens thereof and any other by-laws, regulation and ordinance that they may deem proper for the security of the peace, health, order and good government of said city." Provisions substantially the same as those here relied on are found in most, if not all, of the municipal charters of this state. They are usually embraced in what is commonly called the "general welfare" clause, and they deal with the police, and not the taxing, power of the municipality. Construing the ordinance in question as a taxing or licensing ordinance, the

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power to pass it cannot be derived from these sections of the city's charter. The power "to pass all by-laws and ordinances for the prevention and punishment of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen or citizens * * * and any other by-law, regulation and ordinance that they may deem proper for the security of the peace, health, order and good government of said city," or, in the language of section 1, "the welfare and proper government of said city," does not include the power to levy a tax upon property or upon the carrying on of a business or vocation within the city. The rule is well established that municipal corporations can levy no tax, general or special, upon the inhabitants of the municipality or upon property therein, unless the power to do so be plainly and unmistakably conferred upon them by the state. *Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270; 2 *Dillon's Municipal Corp.* (4th Ed.) 763; *Cooley on Taxation* (2 Ed.) 678. As was said by Mr. Justice Little in the above-cited case: The power to tax is incident to the state. Neither counties nor municipal corporations of any character possess this power to any extent unless conferred by the Constitution or laws of the state, and therefore such power can only be exercised when delegated in plain and unmistakable terms, or when it results by necessary implication from other powers expressly granted. 25 Am. & Eng Enc. L. 580. The exercise of this power being so limited and restricted, the burden is on every political division of the state, which demands taxes from the people, to show the authority to exercise it in the manner in which it has been imposed." It is obvious that no such power is plainly and unmistakably conferred by the charter sections under consideration.

It is contended, however, that this ordinance was a valid exercise of the police power conferred upon the municipality by section 32 of the charter. A similar contention was unsuccessfully made in *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384, which involved the validity of an ordinance of the city of Cartersville, which undertook to make it penal for one who had lawfully purchased, without the limits of the municipality, alcoholic liquors, to receive the same therein from any common carrier or person, without paying a specific tax of a designated amount for the privilege of so doing. The "general welfare" clause of the charter of the city was as follows: "The mayor and aldermen shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort and security of the city and the citizens thereof, not inconsistent with the Constitution and laws of this state, and of the United States." It will be seen that these provisions are substantially the same as those of section 32 of the charter now under consideration. The power conferred upon the municipal government of the city of Cartersville by the above-quoted section or clause of its charter is no more restricted than that conferred upon the municipal

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authorities of the city of Lawrenceville in the charter provisions with which we are dealing. The qualification of the power, in the Cartersville charter, by the words "not inconsistent with the Constitution and the laws of this state, and of the United States," would have been necessarily implied, if it had not been expressed; and the same qualification of the power to pass ordinances, etc., "for the welfare and proper government of [the] city" appears in section 1 of the charter of Lawrenceville, although not expressed in section 32 thereof. In reaching the conclusion announced in the Cartersville Case, this court held "that a municipal corporation can not, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquors from one lawfully authorized to sell the same," and that it therefore followed "that the reception by the purchaser of liquor so bought is not an act which can be legitimately dealt with by the authorities of a municipal corporation as an act within the police power of the state, in the absence of express power so to do." In that case, as we have seen, the municipal authorities undertook to prohibit the reception, in Cartersville, of liquors lawfully purchased elsewhere; and it was held that this could not be done. In the present case, if we construe the ordinance in question as being prohibitory in its purpose, the municipal authorities of Lawrenceville have undertaken to prohibit the delivery in that city of liquors lawfully purchased elsewhere. It is obvious that under the decision in the Cartersville Case they could not lawfully do this, for to prevent the delivery would be to prevent the reception, as the one can not occur without the other.

Another of the sections of the city charter invoked to sustain the validity of the ordinance is section 48 (page 506), the language of which is as follows: "That said mayor and council shall, in the exercise of their police powers, have full power and authority to pass such ordinances as they may think proper to more effectually prohibit the illegal sale of spirituous, vinous, malt or intoxicating liquors within the corporate limits of the city of Lawrenceville, and to that end may provide ordinances punishing any person or persons keeping in said city spirituous, vinous, malt or intoxicating liquors for illegal sale." The contention that this section of the city charter conferred upon the municipal authorities power and authority to pass the ordinance in question scarcely deserves serious discussion. The ordinance does not deal with the sale of intoxicating liquors within the limits of the city, nor with the keeping, in the city, of such liquors for sale. It is admitted that the sale of such liquors within the city of Lawrenceville, or elsewhere in the county of Guinnett, is prohibited by law; and the manifest purpose of the ordinance, construed as an effort to exercise the police power, was to prevent the delivery in Lawrenceville of liquors lawfully purchased outside of Guinnett county. The other sections of the municipal charter which are invoked to support the ordinance are

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section 28 and 30 (pages 498, 499); and here the effort is to uphold the ordinance as a valid exercise of the power of the municipal authorities to impose, and enforce the payment of, license taxes upon any business, profession, or vocation carried on within the city. The first of these sections provided "that said mayor and council shall have full power and authority to require any person," etc., "engaged or carrying on, or who may engage in or carry on, any trade, business, calling, vocation or profession within the corporate limits of said city, * * * to obtain license to carry on such business or profession and pay for such * * * license such amount as the mayor and council may by ordinance prescribe." It also provides that, "Said mayor and council may provide by ordinance for the punishment" of any one "required to pay such license, who [engages] in or [offers] to engage in such business or occupation before paying such tax, or taking out such license." Section 30 confers upon the municipal authorities power to license billiard tables, theatrical companies, and other enumerated things, to place a tax upon brokers, and to regulate markets, etc., auctioneers, itinerant traders, etc., and concludes as follows: "Also all solicitors or canvassers, selling goods or wares by sample at retail to consumers; and all other establishments, businesses, calling or vocation which under the Constitution and laws of this state are subject to taxes." The power claimed for the city under section 28 is the power to impose a license tax upon every person, etc., "who may engage in or carry on, any trade, business, calling, vocation or profession within the corporate limits of said city"; and the power relied on under section 30 is the power to impose such a tax upon all "establishments, businesses, callings and vocations under the Constitution and laws of this state are subject to taxation."

It is clear that the mere delivery by a common carrier of goods of a particular class to the consignees to whom they have been shipped is not a trade, profession, or establishment. Is it a business, calling or vocation? We think not. It is termed in the ordinance in question a business, and the effort is made to tax it as such. But it seems very clear to us that the mere delivery of goods of a particular class at the point of destination by a common carrier to the consignee of such goods is not a business engaged in by the carrier, but a mere incident to the carrier's business. In and of itself, it is no more a business than is the measuring of calico, homespun, or silk by a retail dry goods merchant, when he sells the same to his customers, or the delivery by such a merchant of the cloth to the purchaser thereof, a business conducted by him. It is no more a calling or vocation than is the mere delivery of shoes by a shoemaker, or plows by a blacksmith, to the customer for whom the shoemaker or the blacksmith has made them. It is but a fragmentary part of the business of the carrier. If the city has the power to arbitrarily declare that the mere delivery by a railroad or express com-

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pany of intoxicating liquors, within its limits, is a business, and to impose a license tax upon it as such, then it must necessarily have the power to deal in a like manner with the mere delivery by such carriers of each and every other class of goods transported by them for the public. Under such a construction of the city's power to tax a business, it could separately tax, as a separate business, the delivery by a common carrier of dry goods, of shoes, of drugs, of hardware, and so on and on, through the vast variety of goods handled by the carrier, making, for the purposes of taxation, a separate business of the delivery of each variety of goods. Further, if the city can, for the purposes of taxation, make a separate business of the mere delivery of a particular kind of goods by a common carrier, it can make a separate business of every other incident involved in the carrier's handling of such goods, within the corporate limits. For instance, it could make a separate business of the receiving for shipment of each variety of goods, another of the mere keeping of each kind of goods until transported or delivered, and still another of the transporting, within the limits of the municipality, of each kind of goods to or from the warehouse or storeroom of the carrier. Under this construction of the power of the city to tax a business, there would be practically no limit whatever to the divisions and subdivisions which it might make of a common carrier's business for the purpose of taxation. Where a municipality is simply given the power to impose a license tax upon a business, it cannot divide each business into its constituent elements, parts or incidents and levy a separate tax on each or any element, part or incident thereof.

The case of *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795, is directly in point here. There it was held: "(1) That the furnishing of trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or legal sense. (2) That authority in a municipal charter 'to make just and proper classification of business for taxation,' and 'to classify business and arrange the various businesses, trades and professions carried on in said city into such classes of subjects for taxation as may be just and proper,' did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise and classifying the furnishing of such stamps as a separate business subject to taxation. (3) That, whether the furnishing of the trading stamps be treated as a gift or as a part of the contract of sale of the merchandise which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word 'busi-

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ness' in a commercial or legal sense means something done or carried on for a livelihood, profit, or the like." If the city of Atlanta which not only "has," to quote the language of Mr. Justice Cobb in the opinion in that case, "authority under its charter to impose a tax upon any person carrying on 'any trade, business, calling, or avocation, or profession' within the city," but "has also power to classify business, and arrange the various businesses, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," could not, for the purpose of taxation, make a separate business of a mere incident to the business of a retail merchant, it necessarily follows that the city of Lawrenceville cannot, under the power granted in its charter, make a separate business of the mere delivery by a common carrier of a particular class of goods and levy a license tax thereon. Under the view we take of the case it is unnecessary to discuss the question as to the power of the municipality of Lawrenceville to make a reasonable and proper classification of the business of common carriers for the purpose of taxation. The ordinance of the city of Lawrenceville involved in this case is void, as the municipality had no power, under its charter, to enact it. Having reached this conclusion, for the reasons above given, it is unnecessary for us to determine whether the ordinance is, as contended by the defendant in error, violative of the interstate commerce clause of the Constitution of the United States.

The express company, however, contends that even if the municipal ordinance in question be invalid, it can elect to obey it, and refuse to accept, at its office in the city of Atlanta, shipments of intoxicating liquors consigned to the owners thereof at Lawrenceville. As was said by Mr. Justice Little, in *Southern Express Company v. State*, 107 Ga. 670, 672, 33 S. E. 637, 638, 46 L. R. A. 417, 73 Am. St. Rep. 146: "The plaintiff in error is a common carrier, and as such is bound to receive and transport articles and property offered it for shipment under reasonable rules and regulations. In the case of *Fears v. State*, 102 Ga. 274, 29 S. E. 463, this court held that, notwithstanding the local option liquor law was in force in a particular county, a right of property in spirituous and malt liquors existed in that county. Being property, it was, under existing law, the duty of a common carrier to receive and transport it for a reasonable hire, according to the direction of the owner or sender of the same, unless such transportation has been prohibited by the lawmaking power. * * * The lawmaking power of this state has not yet seen proper to declare the transportation of liquors by common carriers illegal; and inasmuch as rights are vested in liquors, just as they are in any other property, it is, in the absence of such a statute as we have indicated, the public duty of the carrier to receive and transport liquors." Such being the public duty of the carrier, it cannot lawfully decline to discharge it, by electing to obey an invalid municipal ordinance, instead of the valid and

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peremptory law of the state which imposes upon it such public duty. It cannot escape the force of the living law of the land by taking refuge behind a lifeless municipal ordinance.

The court below did not err in granting the mandamus absolute, and the judgment complained of is affirmed. All the Justices concur.

COBB, P. J. I concur in the judgment, but cannot agree to all of the reasoning of the Chief Justice. I do not think that the ordinance in question seeks to tax merely the act of delivering articles mentioned in the ordinance. It seems to me that a proper construction of the ordinance is that an occupation tax is levied upon persons engaged in the business of carriers, who in that capacity transport into the city of Lawrenceville and there deliver articles of the character mentioned in the ordinance. It is true that the ordinance declares it to be unlawful "to deliver or cause to be delivered" the articles of the character mentioned; but I do not think that the word "deliver" there is to be construed in its limited sense, the mere final act of transportation, but the ordinance construed as a whole is an effort to impose an occupation tax upon all persons engaged in the business of transporting intoxicating liquors into the town of Lawrenceville.

I fully concur with what has been said by the Chief Justice as to the ordinance not being justified under the police power. The ordinance not being authorized under the police power, it is therefore to be determined whether it can be justified under the taxing power. The charter of the city of Lawrenceville in broad terms authorizes the imposition of an occupation tax upon persons engaged in business in that city. The authority to impose an occupation tax carries with it the authority to classify the occupations for taxation. *City Council of Augusta v. Clark & Co.*, 124 Ga. 254, 52 S. E. 881. In exercising the power of classification the city authorities must, however, be reasonable, and an arbitrary or unreasonable classification will not be permitted, and the court will declare invalid a tax upon a given class when the classification is palpably arbitrary and unreasonable. The ordinance in question deals with the occupation of carriers. It has been held that a municipal corporation, under a general power to levy occupation taxes, cannot impose an occupation tax upon what is known as a commercial railroad, as distinguished from a street railroad. *City Council of Augusta v. Central Railroad*, 78 Ga. 119. I do not think that this decision is sound, but, of course, it must be respected as the law until it is overruled. I see no reason why a municipal corporation, under a general power to levy occupation taxes, cannot levy an occupation tax upon commercial railroad companies engaged in the business of common carriers in the city, just as they levy an occupation tax upon telegraph, telephone, and similar companies. The city of Lawrenceville undoubtedly has power to impose an occupation tax upon carriers, subject only to the restrictions imposed by the decision above referred to. They, therefore, have the right to

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classify carriers for the purpose of taxation. They may place common carriers in a class to themselves, and carriers other than common carriers in another class, and possibly might make a further subdivision of the general business of carriers. When they are dealing with the subject of common carriers, it certainly would not be unreasonable to place common carriers of goods, common carriers of passengers, and common carriers of live stock in different classes. There would be nothing unreasonable or arbitrary about such a classification, because it is a classification that not only the law, but the commercial world, recognizes as just and reasonable. But if it put into one class common carriers of goods, how much further can the classification extend? Can they divide this class into subordinate classes of carriers of liquors, carriers of dry goods, carriers of hardware, etc.? If so, in any city where a common carrier is engaged in business a separate tax upon such a carrier for every character of goods known to the commercial world could be imposed, and a tax, although small and insignificant in amount on each class of goods, would in many places amount to a confiscation of the entire earnings of the carrier derived from the business going to that place. I do not think that a classification further than into the three great classes known to the law and the commercial world would be reasonable and proper, and to allow the classification to extend further would be placing into the hands of a municipal corporation a power that it cannot be presumed that the General Assembly ever intended should pass to the subordinate public corporations of the state under a general power to impose a tax upon occupations.

The ordinance in question imposes a tax upon carriers of liquors and makes this a business. A person engaged in the business of carrying liquors into the town of Lawrenceville and in no other business could be compelled to pay the tax. But, applied to a common carrier who is not only engaged in carrying all the legitimate articles of commerce, but is compelled by law to receive for shipment all of such articles, an ordinance requiring that a common carrier should pay a tax for the privilege of carrying this one class of the articles transported by it, and a very small class compared to the entire business of the company, is unreasonable and arbitrary, and should be declared void for want of power in the city to enact the ordinance providing for it, in so far as it attempts to levy a tax upon a common carrier of goods.

HOUSTON & T. C. R. Co. *et al.* v. EVERETT.

(Supreme Court of Texas, Nov. 6, 1905.)

[89 S. W. Rep. 761.]

Carriers—Damage to Shipment—Action—Trial—Burden of Proof—Instructions.*—Where a shipment was over the lines of several carriers, in an action for damages to the shipment it was error to instruct that the terminal carrier was liable for all damages, unless it “should satisfy” the jury that the damage occurred on one of the other connecting lines, as the instruction placed a greater burden than the law required.

Same—Connecting Carriers—Contract for Through Shipment—Initial Carrier’s Authority.†—Where a carrier had no authority from connecting carriers to contract for through shipments except by a certain route, a shipper contracting for through shipment could not recover damages to the shipment occasioned by their having gone that way instead of another, as requested; he knowing the limitation of the carrier’s authority.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. J. Everett against Houston & Texas Central Railroad Company and others. A judgment in favor of plaintiff was affirmed by the Court of Civil Appeals (86 S. W. 17), and defendants bring error. Reversed.

S. R. Fisher, J. H. Tallichet, and Baker, Botts, Parker & Garwood, for plaintiffs in error.

McLean & Spears, for defendant in error.

BROWN, J. The following statement of the case and of the evidence will be sufficient for the purposes of this opinion: Everett was the owner of certain cattle which he desired to ship from the town of Llano, in Texas, to Fairfax, in Oklahoma Territory, and presented to the agent of the Houston & Texas Central Railroad Company at Llano the following writing: “Llano, Texas, April 8, 1903. Mr. E. W. Tarrence, Agent Houston & Texas Central Railroad Company, Llano, Texas—Dear Sir: For the purpose of making a shipment of cattle from Llano, Texas, to Fairfax, Oklahoma Territory, I desire thirteen cars at Llano on

*For the authorities in this series on the subject of the burden of proving which carrier was guilty of the negligence causing loss or injury to freight transported over several connecting lines, see foot-notes appended to *Meredith v. Seaboard Air Line Ry.* (N. Car.), 17 R. R. R. 641, 40 Am. & Eng. R. Cas., N. S., 641; *Walter v. Alabama Great Southern R. Co.* (Ala.), 17 R. R. R. 42, 40 Am. & Eng. R. Cas., N. S., 42; *Chicago, etc., Ry. Co. v. Woodward* (Ind.), 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Bullock v. Boston & H. Dispatch Co.* (Mass.), 16 R. R. R. 594, 39 Am. & Eng. R. Cas., N. S., 594.

†For the authorities in this series on the right to select a connecting carrier, see foot-notes appended to *Chicago, etc., Ry. Co. v. Woodward* (Ind.), 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Steidl v. Minneapolis & St. L. R. Co.* (Minn.), 16 R. R. R. 668, 39 Am. & Eng. R. Cas., N. S., 668.

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the 14th day of April, 1903. I herewith tender you one-fourth of the freight charges for the use of the cars. [Signed] W. J. Everett." The railroad company failed for one day to furnish the cars in accordance with the demand; but having furnished the cars the next day the cattle were loaded at Llano and shipped over the Houston & Texas Central Railroad to Brenham, thence by the Gulf, Colorado & Santa Fe and the Atchison, Topeka & Santa Fe Railroads to their destination. When the application for the cars was made, Everett informed the agent that he wished to send his cattle by Lampasas, thence over the Gulf, Colorado & Santa Fe Railroad, or by McNeil and then to Milano Junction and over the Santa Fe. He inquired as to the through rate of freight from Llano to Fairfax and was told that it was \$63.25 by Brenham. The agent told him that he had no through rate by Lampasas or McNeil, but that he thought he could get the same rate by either route. Before the cattle were loaded Everett again inquired of the agent as to the rate, and was informed that there was no through rate by Lampasas or by McNeil, and that he could not give a through waybill to the place of destination by either of those routes, but that he could give him a through waybill by Brenham, thence over the Gulf, Colorado & Santa Fe, at the rate stated. Everett was not satisfied with having to go by Brenham, but finally signed the contract. At that time the agent at Llano had no authority to make a through rate from Llano to Fairfax, except by Brenham and then over the Gulf, Colorado & Santa Fe, and had no authority from either of the other roads to make a contract for the through carriage of the cattle, except as above stated. The distance by Brenham was something over 200 miles further than by either of the other routes; the cattle were on the road from Llano to Fairfax 62 hours. They could have been delivered by ordinary care and diligence over either of the other routes within 32 to 40 hours. The cattle were damaged by delay caused by the greater distance they were carried, and were also damaged by delay and the manner of handling them upon the connecting lines. Everett brought this suit to recover of the plaintiffs in error for damages to his cattle on account of the delay and the manner of handling them on the way, and also to recover of the Houston & Texas Central Railroad Company the penalties for failure to deliver the cars according to the demand made.

Upon the trial the court gave to the jury the following charge: "You are instructed that, if you find that plaintiff's cattle have been damaged by the negligence of defendants, then such damages, if any, are presumed in the law to have occurred by the negligence, if any there was, of the last carrier receiving said cattle, and it would devolve upon such last connecting carrier to show from the evidence that such damages, if any, occurred on the line or lines of some other connecting carrier, in order for it to be relieved from being responsible for such damages, if any, as may have been shown to have been incurred from negligence, if

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any, while said cattle were in transit; and the same rule would apply with each last connecting carrier that handled said cattle, unless the evidence satisfies you that the damages, if any, did in fact result from the negligence, if any, of one or more of said defendants on their respective lines of railroad; and then, if the evidence so shows, you will apportion the damages, if any, between the respective defendants according to such damages, if any, as resulted from the acts of negligence, if any, that occurred on their respective lines of railroad, and for no more." In this charge the court tells the jury, in effect, that the last carrier, which was the Atchison, Topeka & Santa Fe Railroad Company, was liable for all the damages which occurred to the cattle in the course of shipment, unless it "should satisfy" them by the evidence that the damages occurred on one of the other connecting lines. This charge placed upon the connecting carriers a greater burden than the law requires. *Willis v. Chowning*, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; *Railroad Co. v. Matula*, 79 Tex. 577, 15 S. W. 573. The charge was such error as requires a reversal of this judgment.

The Houston & Texas Central Railroad Company requested the court to charge the jury as follows: "You are instructed that, if you believe from the evidence that the plaintiff, W. J. Everett, demanded of defendant, the Houston & Texas Central Railroad Company, that his cattle be routed by way of Lampasas, or by way of McNeil and Milano, and that said cattle be waybilled through at the rate of \$63.25 per car, and if you further believe from the evidence that, under the rules and regulations of said defendant and of the connecting carriers in force on April 15, 1903, such cattle could not be waybilled through by either of said routes, and that said cattle could only be waybilled through at said rate by said defendant under such rules and regulations by way of Brenham, then the plaintiff can recover no damages, if any, which may have been suffered by said cattle on account of their transportation by way of Brenham." If the facts grouped in the charge be true, then neither of the railroad companies in this case could be liable for damages caused by carrying the cattle by way of Brenham, instead of by a shorter route; and, as the evidence was sufficient to authorize the jury to find the facts stated in the charge, the court erred in not submitting the issue.

When Everett demanded of the agent of the Central Railroad Company a through waybill and contract of shipment with a fixed rate for the entire trip, the agent of that company could not, in compliance with the demand, ship the cattle over any route other than that for which he had authority from the connecting lines to make such a contract. The condition that Everett placed upon the acceptance of the cattle of giving a through waybill and through rate necessarily designated the route by Brenham; that being the only route over which such rate and waybill could be given. We think that it is well settled by the authorities, al-

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though there is some conflict, that in the absence of any agreement or custom or course of dealing from which authority could be implied, the initial carrier has no power to make any contract which would bind the connecting carrier. If the connecting carrier be so situated in relation to the initial line that the law requires it to receive and carry such freight, then such carrier would be liable if it should refuse to do so, and, if negligent, would be liable for damages under the law; but the liability would not be based upon the unauthorized contract made by the initial carrier. *G. C. & S. F. Ry. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470; 5 Am. & Eng. Ency. Law, p. 459; *Crossam v. N. Y. & E. Ry. Co.*, 149 Mass., 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

The writ of error was granted in this case because the demand was made for cars to go beyond the line of the Houston & Texas Central Railroad Company, but the point was made on the allegations of the petition, which are materially different from the written demand, and, as the case must be remanded for another trial and the party may eliminate that question by an amendment to the pleadings, we find it unnecessary to discuss it here.

For the errors stated, the judgments of the district court and Court of Civil Appeals are reversed, and the cause remanded.

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(Court of Appeals of Maryland, Nov. 16, 1905.)

[62 Alt. Rep. 245.]

Carriers—Carriage of Passengers—Degree of Care Required by Carrier.*—The degree of care a carrier owes to its passengers is the exercise of the utmost care which human foresight can exercise, though it is not an insurer of the safety of the passengers.

Same—Breach of Carrier's Duty—Cause of Action.—The breach of duty by a carrier to its passengers constitutes the cause of action for an injury to a passenger resulting therefrom, and the facts evidencing the breach are not the breach, but merely the facts which prove that a breach has occurred.

Pleading—Allegation of Facts—Sufficiency.—A declaration which sets forth the facts constituting the cause of action, without detailing the circumstances constituting the evidence of them, is sufficient.

*See foot-note appended to *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Little Rock Trac. & Elec. Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-note appended to *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

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Carriers—Injury to Passenger—Declaration.†—A declaration, in an action against a carrier for injuries to a passenger, which alleges that the carrier “negligently and unskillfully conducted itself in carrying plaintiff and in managing the said railroad and the car and train in which plaintiff was a passenger,” and that he was thereby injured, sufficiently specifies the particulars of the carrier’s negligence, at common law and under Code Pub. Gen. Laws 1904, art. 75, § 24, subsec. 36, giving a form for a declaration in an action for injuries received by a passenger, and declaring that the same may be changed to adapt it to other cases by “changing the allegation as to the cause of the accident.”

Appeal from Circuit Court, Talbot County; James A. Pearce and Wm. R. Martin, Judges.

Action by Robert J. Allen against the Philadelphia, Baltimore & Washington Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the declaration in the action:

“State of Maryland, Cecil County—to wit: Robert J. Allen, by his attorney, Albert Constable, sues the Philadelphia, Baltimore & Washington Railroad Company, for that the defendant is a corporation possessing and operating a railroad from between Bridgeville and Seaford, and was a carrier of passengers from said Bridgeville to said Seaford for reward to the defendant; and the plaintiff became and was received by the defendant as a passenger, to be by it safely and securely carried upon said railroad on a journey from said Bridgeville to said Seaford, for reward to the defendant. Yet the defendant did not safely and securely carry the plaintiff upon said railroad on said journey, and so negligently and unskillfully conducted itself in carrying the plaintiff upon said railroad on said journey, and in managing the said railroad and the car and train in which the plaintiff was a passenger upon the said railroad on the said journey as aforesaid, that the plaintiff, while in the exercise of due care upon his part, was thereby thrown down and wounded and injured, and incurred loss of time and expense in and about the care of his wounds and injuries. And the plaintiff claims twenty thousand dollars. Albert Constable, Plaintiff’s Attorney.”

Argued before MCSHERRY, C. J., and FOWLER, BRISCOE, BOYD, SCHMUCKER, and JONES, JJ.

L. Marshall Haines, for appellant.

Albert Constable, Jr., for appellee.

MCSHERRY, C. J. The only question which is before the court for decision on this record arises on the plaintiff’s demurrer to the defendant’s third plea. The plea is undoubtedly bad and

†For the authorities in this series on the subject of pleading negligence, see foot-notes appended to *Malott v. Sample* (Ind.), 17 R. R. R. 595, 40 Am. & Eng. R. Cas., N. S., 595; *Kansas City, M. & B. R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26.

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the demurrer to it was properly sustained; but the contention of the defendant, the appellant here, is that as the demurrer mounted up to the first error in the pleadings, and as the declaration is insufficient, because indefinite and vague, the trial court should have looked back to the declaration and should have held it bad, instead of striking down the third plea. So the ultimate and single inquiry presented is this: Is the declaration sufficient in law?

The declaration is brief, and will be found set forth above. The suit is between a passenger and a carrier to recover damages for a personal injury sustained by the former in consequence of the alleged negligence of the latter whilst transporting the plaintiff over its railroad. The objection to the declaration is that it fails to specify the particulars wherein the negligence of the railroad company consisted, and was therefore too uncertain to apprise the defendant of the precise act of negligence upon which the plaintiff relied to sustain a recovery. This objection is more of an academic than a practical one in this case; because, had the declaration been so vague as not to inform the defendant of the facts constituting the cause of action, the defendant would have surely demurred directly to it, instead of interposing several pleas, and would not have gone into a trial lasting five days before a jury on the issues of fact joined on those pleas, and would not have delayed until reaching this court before questioning the sufficiency of the narr, on the ground of the insufficiency of its averments. It seems a little singular that the company, after contesting a case on its merits through all of its stages, and until the rendition of the verdict against it and the entry of the judgment thereon, should fail to discover until the trial had ended and the record was in this court what neglect of duty it was charged with. There is no pretense that by reason of the vagueness of the narr's allegations the company was deprived of an opportunity to present any defense it might have had; and it is not even suggested that, if a new trial were awarded and the narr were amended so as to set forth more specifically the cause of the injury, the railroad company would be any more definitely apprised of the facts relied on to sustain a recovery than it was when it filed its pleas, or that it would be, in consequence of such an amendment, better prepared to shape its defense. The question before us is, therefore, not a practical one; but, as it is raised, it must be disposed of.

As we have said, this is a case between a passenger and a carrier of passengers to recover damages for an injury sustained by the passenger in consequence of the negligence of the carrier during the period the above-named contractual relation existed between them. The degree of care required by such a carrier and the precise duty which it owes to such a passenger is clearly defined in the law. The carrier owes to the passenger the exercise of the utmost care and diligence which human foresight can use, though not an insurer of the safety of the passenger. *Balto. City Pas. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39

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L. R. A. 161. A breach of that duty is negligence, and, if any injury results therefrom and is the consequence thereof, an action will lie at the suit of the person thus injured. It is the breach of the duty which is owed that constitutes the cause of action. The particular circumstances which evidence that breach are not the breach itself, but are merely the facts which prove that a breach of the duty that was owed had occurred. Now, in the structure of pleadings, even in their strictest forms, before the introduction of modern simplified systems, it was a most important principle of the law of pleading that although any particular fact might be the gist of a party's case, and though the statement of it was indispensable, still in alleging the fact it was unnecessary to state such circumstances as merely tended to prove the truth of the fact alleged. The dry allegation of the fact, without detailing a variety of minute circumstances which constituted the evidence of it, was sufficient. 1 Chitty's Pl. (8th Am. Ed.) par. page 225. And this doctrine obtains to-day when much of the verbiage and nearly all of the technical precision once required in pleadings have been dropped and abandoned. As only the facts constituting the cause of action need be stated, it is a cardinal rule that they must be averred or set forth with certainty, by which term is signified a clear and distinct statement of them, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chitty's Pl. (8th Am. Ed.) par. page 233.

Let us now see whether the declaration we are dealing with complies with these requisites. It states that the plaintiff was a passenger between certain named points on the railroad of the defendant company; that the company undertook to carry the plaintiff safely and securely from one of those points to the other; that the company "so negligently and unskillfully conducted itself in carrying the plaintiff and in managing the said railroad and the car and train in which the plaintiff was a passenger * * * that the plaintiff * * * was thereby thrown down and wounded and injured," etc. Here, then, is a distinct statement of the duty owed by the carrier to the passenger, and a like averment of the breach of that duty in the negligent and unskillful management of the railroad, the car, and the train, whereby the plaintiff was thrown down and injured. The dry allegation of fact is that the company negligently managed its railroad and train and car; but the evidentiary facts proving or tending to prove that negligence are not set forth, and there was no occasion to aver them. The asserted negligence, and not the facts which proved the negligence, constituted the cause of action. Negligence may be made manifest by a variety of circumstances; but, whatever the evidentiary circumstances may be, the thing they prove, if they have probative value at all, is negligence, and negligence in respect of some designated act of commission or omission is the thing to be proved, and therefore

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the thing to be alleged in the pleading. In this instance it was alleged to be the negligence of the company in managing its railroad and the car and train in which the plaintiff was a passenger, and that this averment sufficiently apprised the defendant of the charge it was required to answer is apparent from the circumstances that it entered the plea of not guilty and proceeded to trial thereon, instead of challenging the declaration by a demurrer on the ground of vagueness and uncertainty. An averment that the cause of the injury was the negligence of the company in managing its railroad and the car and train in which the plaintiff was a passenger is a definite statement of the fact upon which the plaintiff relied to sustain a recovery, and did not need to be amplified by a recital of other facts, which, if established, merely proved that there had been negligence in the management of the railroad and train and car in which the plaintiff was a passenger.

But, apart from the foregoing considerations, there are precedents for the form of the declaration used in this case. In *Bullen & Leake, Precedents of Pleading*, 284, a very similar declaration will be found. The averments there made are that the carriers "so negligently and unskillfully conducted themselves in carrying the plaintiff upon said railway on the journey aforesaid, and in managing the said railway and the carriage and train in which the plaintiff was a passenger upon the said railway, * * * that the plaintiff was thereby wounded and injured," etc. That form is supported by, or at least a similar one was followed in, the case of *Curtis v. Drinkwater*, 2 B. & Ad. 169; and the case of *Brien v. Bennett*, 8 C. & P. 724. See, also, substantially the same form in 2 Chitty's Pl. (8th Am. Ed.) mar. page 650. In article 75, § 24, subsec. 36, Code Pub. Gen. Laws 1904, the form given for a case like this contains the averment that "by reason of the insufficiency of an axle of the car in which he was riding the plaintiff was hurt," and the same subsection declares: "This form may be varied so as to adapt it to many cases, by merely changing the allegation as to the cause of the accident." The declaration in the case at bar conforms to the requirements of the Code, since it distinctly alleges that "the cause of the accident" was the defendant's negligence "in managing its railroad, and the car and train in which the plaintiff was a passenger."

The court below committed no error in not declaring the declaration bad, and the judgment appealed against will be affirmed. It is accordingly so ordered.

Judgment affirmed, with costs above and below.

CHICAGO CITY RY. CO. *v.* SHAW.

(Supreme Court of Illinois, Feb. 21, 1906. Rehearing Denied April 12, 1906.)

[77 N. E. Rep. 139.]

Appeal—Review of Evidence—Peremptory Instruction.—Where no peremptory instruction was asked at the close of plaintiff's evidence, or at the close of all the evidence, the question whether the evidence fairly tended to support the verdict will not be reviewed on appeal.

Same—Decisions of Intermediate Courts.—In an action for injuries to a passenger, in the absence of a request for a peremptory instruction the question whether defendant's employees were negligent, as charged in the declaration, was solely for the determination of the jury, whose finding, after having been affirmed by the Appellate Court, would not be disturbed on a further appeal to the Supreme Court.

Trial—Theory of Case—Argument of Counsel.—Remarks of counsel in his closing argument to the jury will not control the theory on which the case is tried, when the pleadings, evidence, and instructions show that both parties proceeded on a different theory.

Carriers—Injuries to Passengers—Proximate Cause.*—Where a passenger on a street car was injured in a collision between the car and a railroad train at a crossing, and the fault of the conductor of the street car in signaling to the motorman to cross when he knew a train was approaching contributed in part to the injury, the street car company was liable therefor.

Appeal — Instructions — Prejudice.—Where a charge was given at defendant's request that if any witness had willfully or knowingly sworn falsely to any material element of the case, or had exaggerated

*For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co. (Ind.)*, 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; foot-note appended to *Gilliam v. Texas & P. Ry. Co. (La.)*, 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ramsbottom v. Atlantic Coast Line R. Co. (N. Car.)*, 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; *St. Louis & S. F. R. Co. v. League (Kan.)*, 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Alabama Great So. R. Co. v. Vail (Ala.)*, 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; *Lewis v. Vicksburg, etc., Ry. Co. (La.)*, 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; *Phillips v. Durham & C. R. Co. (N. Car.)*, 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; *Anderson v. Southern Ry. (S. Car.)*, 17 R. R. R. 701, 40 Am. & Eng. R. Cas., N. S., 701; foot-notes appended to *Illinois Cent. R. Co. v. Watson (Miss.)*, 17 R. R. R. 199, 40 Am. & Eng. R. Cas., N. S., 199; foot-note appended to *Birmingham Ry., etc., Co. v. Hinton (Ala.)*, 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173 (Ala.); *Peerless Mfg. Co. v. New York, etc., R. R. (N. H.)*, 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; *Shamblin v. New Orleans & N. W. R. Co. (La.)*, 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528; *Fishburn v. Burlington & N. W. Ry. Co. (Iowa)*, 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to *Pharr v. Morgan's L. & T. R. & S. S. Co. (La.)*, 16 R. R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Southern Ry. Co. v. Williams (Ala.)*, 16 R. R. R. 429, 39 Am. & Eng. R. Cas., N. S., 429; *Smith v. Fordyce (Mo.)*, 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; foot-notes appended to *Dean v. Oregon R. & Nav. Co. (Wash.)*, 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

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any fact or circumstance material to the issues to deceive, mislead, or impose on the jury, such witness' entire testimony might be rejected, except as corroborated by other evidence, etc., defendant was not injured by another instruction that it was only in cases where it was "palpable" that a witness had deliberately and intentionally sworn falsely and was not corroborated that the jury should disregard his entire testimony.

Trial—Remarks of Court.—Where remarks by the court during the trial, amounting to strictures on counsel for defendant, were called forth by persistent attempts to get improper evidence before the jury, and the remarks were not of such a character as disclosed in any degree the court's views as to the merits of the case, or tended to show any views in favor of either party, and could not have been so understood by the jury, they were not reversible error.

Witnesses—Leading Questions.—A question asked of a witness with reference to a headlight on an engine: "That headlight—was that a regulation or another kind?" was objectionable, as leading.

Evidence—Hearsay.—Where a witness testified to facts showing that he did not see the engine in question or the headlight thereon, it was not reversible error for the court to strike his statement that the headlight was smaller than regulation size.

Appeal—Harmless Error—Admission of Evidence.—Where, in an action for injuries, evidence was admitted showing that the railroad train which ran into defendant's street car at the time plaintiff was injured while a passenger on the car was running at from 15 to 30 miles an hour, defendant was not prejudiced by the exclusion of evidence that the train was running faster than ordinary speed.

Carriers—Injuries to Passengers—Actions—Evidence.—Where, in an action for injuries to a passenger on a street car by a collision with a railroad train at a crossing, the conductor, who went ahead and signaled the car to cross, testified that he saw the train when two blocks away, and did not realize there was any danger until it was within 100 feet of the crossing, and fixed the location of the train at each of the periods he observed it, without basing his judgment in any way on its apparent speed, or any speed that he previously had knowledge of, a city ordinance regulating the rate of speed of trains at that point was immaterial.

Same—Care Required.†—An instruction rendering a carrier liable for injuries to a passenger caused by the "slightest negligence" was proper.

Appeal from Appellate Court, First District.

Action by George M. Shaw against the Chicago City Railway Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court affirming a judgment in favor of appellee for damages for personal injuries he is alleged to have sustained by reason of the negligence of appellant. The evidence discloses that appellee was a passenger upon an electric car belonging to appellant, going in a westerly direction on Thirty-First street, in the city of Chicago. Stewart avenue runs north and south and crosses Thirty-First street, and just west of Stewart avenue and adjacent to it there is a system of eight railroad tracks running north and south across Thirty-First street. At the crossing of

†See preceding case and foot-note.

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the tracks on Thirty-First street there are gates, operated in the daytime by the Pennsylvania Railroad Company. There was also at that crossing a flagman, employed by said company, whose duty it was to warn travelers of the approach of trains. When the car in question reached the railroad crossing, the car stopped at Stewart avenue, and the conductor ran ahead to ascertain if any trains were in sight, and about the time he got to the middle of the tracks, it appearing to him that there was no danger, he gave the signal to the motorman to come ahead. It was about 6 o'clock in the evening of December 4, 1899, and was dark and stormy. The car proceeded to cross the system of tracks, and after starting across the tracks the flagman employed by the railroad company began to wave his flag, and shouted to the motorman to stop. The motorman proceeded until over half way across the system of tracks, when, the flagman still hallooing and waving his flag at him, he stopped his car, and just as his car was stopped a Wabash train, running on the Chicago & Western Indiana tracks, struck the rear end of the car, causing injuries to appellee, for which he seeks to recover the damages.

William J. Hynes and Samuel S. Page (Nathaniel C. Sears and Mason B. Starring, of counsel), for appellant.

Mason & Wyman, for appellee.

RICKS, J. It is first contended that under the circumstances the conductor was not negligent in giving the signal to cross. It was solely a question of fact for the jury to determine whether or not appellant's employees were negligent as charged in the declaration, under proper instructions from the court; and having so found that they were negligent, and the judgment of the Appellate Court having affirmed the finding of the jury and the judgment entered by the trial court, we are not at liberty to disturb their finding, as all controverted questions of fact in such cases are settled by the finding and judgment of the Appellate Court.

It is further contended by appellant that in his closing argument counsel for appellee stated to the jury that the motorman was not to blame, and was not negligent in proceeding with the car, and that therefore the theory of the plaintiff was that the conductor was the only person in the employ of appellant that was negligent, and therefore the theory on which appellee's case was tried was not in accord with the allegations of his declaration, and therefore he could not recover. But the pleadings, evidence, and instructions given by the court do not bear out this theory. The remarks of counsel in his closing argument to the jury would not control the theory upon which a case is tried, when the pleadings, evidence, and instructions showed that both parties proceeded upon the theory that the issue was the negligence of both the conductor and motorman.

It is next insisted that the conductor's act was not the prox-

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imate cause of the injury, but that the flagman's signal to stop was the proximate cause, and therefore appellee could not recover. But if the fault of the conductor in signaling to the motorman to come on when he saw and knew a train was approaching was such negligence as contributed to the injury or caused it in part, as the jury must have found it was under the instructions, appellant would be liable anyway. But, as it was a question of fact as to whether the acts contributed to the negligence which caused the injury, the judgment of the Appellate Court is final.

The next error relied upon is the giving of the eighth instruction asked on behalf of appellee. The instruction reads as follows: "It is the duty of the jury, in passing upon the credibility of the testimony of the several witnesses, to reconcile all the different parts of the testimony, if possible. It is only in cases where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other credible evidence, that a jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some part of his evidence, it does not follow as a matter of law that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony. It is the duty of the jury to consider carefully all the testimony in the case bearing upon the issues of fact submitted to them, and, if possible, to reconcile any and all apparently conflicting statements of the witnesses." The particular complaint made of this instruction is the use of the word "palpable," contained in the second sentence of the instruction. A similar instruction was before this court, containing the word here complained of, in the case of *North Chicago Street Railroad Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483. On page 468 of 180 Ill., page 484 of 54 N. E., it is discussed and held to be an inaccurate expression of the law. In that case the court took the view that the inaccuracy was not of such a character as would mislead the jury or require a reversal of the case. In the case at bar, at the request of appellant, this instruction was given: "The court instructs the jury that it is a principle of law that if you believe, from the evidence, that any witness has willfully or knowingly sworn falsely to any material element of the case, or that any witness has willfully and knowingly exaggerated any fact or circumstance material to the issues in the case, for the purpose of deceiving, misleading, or imposing upon the jury, either as to the origin of plaintiff's alleged ailments, so far as, from all the evidence, you believe they exist, or as to the nature and extent of the alleged injury, or as to the manner of the alleged accident in question, then the jury have a right to reject the entire testimony of such witness, except in so far as corroborated by other evidence which you believe, or by facts and circumstances appearing in the case." If any doubt may have arisen from the use of the word complained of in the instruction given in behalf of appellee

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the instruction given by appellant was of such a character as to make it clear to the jury under what circumstances they might disregard the testimony of a witness. Instructions are to be regarded as a series, and there was no such conflict between the two instructions that this court would be authorized to say that it was likely that the jury were misled, or that they did not know which of two rules to follow. We do not regard the instruction as one that should be given; as it is desirable to avoid inaccuracies of expression of legal propositions; but absolute accuracy is a thing seldom to be attained, and courts are not, for the want of it alone, to set aside verdicts, but are only justified in doing so in cases where the inaccuracy is of such a character that the court must feel that it is likely that the jury were misled thereby.

The next contention is that the court erred in making improper and unnecessary remarks throughout the entire trial which were prejudicial to the appellant. After a careful examination of the record upon the question we think that, while the court unnecessarily made remarks that were not entirely proper, yet to a great extent, if not altogether, the remarks were caused by the persistency of counsel for appellant in trying to get evidence before the jury which was highly improper, and which had been refused by the court, and by commenting upon rejected evidence in his argument to the jury. The record shows that when evidence was offered by counsel for appellant and objections made thereto, or when objection was made by him to evidence offered by appellee and the court ruled adversely to the contention of appellant, counsel for appellant would enter into a controversy with the court as to the propriety of his ruling, and in many instances, in matters that were clearly improper, he would evade the ruling made by the court by dividing the subject-matter of the objectionable evidence into various parts and offering them separately; also, that counsel for appellant, in his argument to the jury, undertook to discuss evidence that had been excluded by the court, among which was the verdict of the coroner's jury as to the cause of the death of the motorman, who was killed in the same accident, and attempted to argue to the jury that that verdict would show where the blame lay, and to this the court sustained an objection. This course of appellant's counsel seems to have exasperated the court, and to have called forth remarks that might be regarded as strictures upon counsel. It is the duty of the court to avoid making remarks that may in any degree reflect upon counsel, but it is not always reversible error, if the remarks are justified by the conduct of counsel against whom they are directed. It is the duty of counsel to submit to the rulings of the court, and, if he persists in a course that is clearly in violation of his duty, the court must be allowed some discretion in preserving order and commanding respect to his rulings. From a careful examination of this record, while we do not wholly justify the court, we are satisfied that there was much provocation, and that the remarks were not of such a character

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as showed, in any degree, the views of the court as to the merits of the case, or tended to show any views in favor of either party to the cause, and would not be so understood by the jury; and we think the verdict should not, for that reason, be set aside.

It is next insisted that the court erred in the exclusion of proper evidence offered by appellant. The witness Page, on direct examination, was asked: "That headlight—was that a regulation or another kind?" An objection was sustained to the question. The witness volunteered by saying, "I know what kind of a headlight it was," and was asked what kind it was, and answered it was a smaller size than the regulation headlight. Appellee objected to the question and answer, and they were stricken. The first question to which the objection was sustained was leading. The other was predicated upon the information volunteered by the witness. The witness, however, in his testimony, showed that he did not see the headlight or the engine; that he was a brakeman and the train was a passenger one; that he came through the depot, entered the rear coach of the train, and occupied the same until the train reached Archer avenue, when he got on the front end of the rear coach and occupied that position until the accident, and after the accident ran back of the train to flag other trains. There is no evidence in the record at all that he saw the engine or the headlight. We think there was not such error in the ruling of the court as to this evidence as would justify a reversal on that ground.

It is complained that the trial court erred in including evidence showing that the train was running at a high rate of speed—higher than the ordinary—and also in excluding the city ordinance regulating the speed of trains at that place. Appellant urges that this evidence was material, in that the conductor of the electric car had the right to assume that the Wabash train was running within the requirements of the law, and to base his judgment, as to the time he would have to pass, upon that fact. Evidence was admitted showing the speed of the train, and ranged from 15 to 30 miles an hour. The ordinance was not material. The conductor of the electric car did not state that he judged according to the usual rate of trains on those tracks, or anything to that effect. The testimony was that he saw the train when two blocks away, and gave a signal to his motorman to bring the car across, and that he did not realize there was any danger until the train was within 100 feet of the crossing. He fixes the location of the train at each of the periods he observed it, and does not say that his judgment was in any way affected by its apparent speed, or any speed that he previously had knowledge of. To allow appellant's contention in this regard would be to assume that which the conductor did not claim.

It is next insisted that the court erred in giving the sixth instruction tendered by appellee. That part of the instruction objected to is as follows: "While the carrier is not an insurer for the absolute safety of the passenger, he does, however, in legal

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contemplation, undertake to exercise the highest degree of care consistent with the practical operation of its road to secure the safety of the passenger, and is responsible for the slightest negligence resulting in injury to the passenger, provided the passenger is at the time of the injury exercising ordinary care and caution for his own safety." The words in the instruction that are complained of are "slightest negligence." Practically the same instruction, with the same words complained of, was before this court in the case of *Chicago & Alton Railroad Co. v. Byrum*, 153 Ill. 131, and cases cited on page 135, 38 N. E. 578, 579, and the giving of the same was approved. We do not feel at liberty to overrule what was said in that case, and are of the opinion that the instruction stated the law correctly.

After a careful review of all of the points raised we think that there is no error in the record that would warrant a reversal of the case. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

ROGERS v. CHOCTAW, O. & G. R. Co.

(Supreme Court of Arkansas, Oct. 7, 1905.)

[89 S. W. Rep. 468.]

Carriers—Equipping Freight Train for Passengers.*—A carrier, though taking a passenger on a freight train, is not required to equip it with conveniences for passengers.

Same—Negligence after Discovery of Passenger's Peril.—Evidence in an action for injury to a passenger held sufficient to go to the jury on the question of the negligence of the conductor of a train in not using proper care, after becoming aware of the peril of a passenger, to protect him, thus making the carrier liable, though the passenger was negligent in getting in the position.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see *St. Louis, I. M. & S. Ry. Co. v. Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541 (injury to person on freight train, who had not tried to ascertain whether it was intended for passengers, where is was against carrier's rules for such train to carry passengers, carrier not liable where collision was due to carelessness, but not to wanton or willful negligence); *Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex.), 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344 (authority of brakeman to allow person to ride on freight car not to be inferred from carrier's knowledge of custom); *Dysart v. Missouri, K. & T. Ry. Co.* (C. C. A.), 8 R. R. R. 197, 31 Am. & Eng. R. Cas., N. S., 197 (apparent authority of trainmaster to take passenger on freight train binding upon carrier); *Western Maryland R. Co. v. State* (Md.), 6 R. R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904; note, 4 R. R. R. 486, 27 Am. & Eng. R. Cas., N. S., 486 (duties with respect to accommodation during transportation on freight trains); note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7; note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154; note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217; note, 4 R. R. R. 536, 27 Am. & Eng. R. Cas., N. S., 536; note, 1 R. R. R. 904, 25 Am. & Eng. R. Cas., N. S., 904 (receiving and

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Appeal from Circuit Court, Monroe County; George M. Chapline, Judge.

Action by J. D. Rogers against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Appellant J. D. Rogers, sued the Choctaw, Oklahoma & Gulf Railroad Company to recover damages for injuries caused by negligent operation of its train while he was a passenger thereon. A trial was had before a jury, appellant testified in his own behalf, and rested his case, whereupon the court instructed the jury to return a verdict in favor of defendant, which was done.

C. F. Greenlee, for appellant.

E. B. Peirce and *T. S. Buzbee*, for appellee.

McCULLOCH, J. The only question before us for determination is whether the evidence introduced by the plaintiff was legally sufficient to support a verdict in his favor, and in testing that question we must give the testimony its strongest probative force, and accept the view of the facts which it will warrant most favorable to plaintiff's cause of action. *Catlett v. Railway*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Ford v. St. L., I. M. & Sou. Ry. Co.*, 66 Ark. 363, 66 S. W. 864; *Burns v. St. L. & S. W. Ry. Co.* (Ark.) 88 S. W. 824.

Appellant lived at Brinkley, a station on defendant's railroad, but was engaged in business at a switch known as the "G. & C. Siding," 6½ miles west of Brinkley, on defendant's road. Passenger trains did not stop at this switch, and appellant was accustomed to ride out there two or three times a week on freight trains which stopped there. On the occasion in question he boarded a freight train at Brinkley to go to the switch, and also shipped a lot of merchandise to be put off there. En route he became sick, and his bowels wanted to move; the call being too urgent to await the arrival at his destination. The caboose was not provided with a closet, and he asked the conductor to slow

discharging passengers); note, 10 Am. & Eng. R. Cas., N. S., 263 (assumption of increased risks by passengers on freight trains); *Means v. Carolina Cent. R. Co.* (N. Car.), 14 Am. & Eng. R. Cas., N. S., 363 (duty to have conductors on freight trains); *Beyer v. Louisville & N. R. Co.* (Ala.), 9 Am. & Eng. R. Cas., N. S., 819; *Howard v. Boston & N. R. Co.* (Mass.), 10 Am. & Eng. R. Cas., N. S., 260; *Southern Ry. Co. v. Howard* (Ga.), 18 Am. & Eng. R. Cas., N. S., 758 (passenger on freight train cannot demand to be carried to other than regular stopping place of such train); *Garland v. Southern Ry. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 759; *Louisville & N. R. Co. v. Hine* (Ala.), 14 Am. & Eng. R. Cas., N. S., 380 (right of person to board freight train, without permit, relying on ticket agent's representations); *Allen v. Lake Shore & M. S. Ry. Co.* (Ohio), 9 Am. & Eng. R. Cas., N. S., 25 (right of sheriff to ride on freight train); *Walker v. Green* (Kan.), 14 Am. & Eng. R. Cas., N. S., 366 (shipper riding unnecessarily in freight car with permission of trainmen, is guilty of contributory negligence).

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the train down so that he could get off, attend to the call of nature, and walk the remainder of the distance to the switch. The conductor declined to do that. Shortly afterwards the train reached the switch, and was brought to a stop, but the caboose was stopped over a trestle 85 feet long and 20 feet above the surface of the ground. Appellant testified that he did not know that the caboose was over the trestle, and walked out on the rear step, expecting to get off; that as he walked out on the step he met the conductor going into the caboose, and the latter said to him, "You are in a hurry?" to which the appellant replied, "Yes, I am;" that a brakeman on the front platform of the caboose called to him, saying, "Just squat on the steps." Appellant describes the incident as follows: "This man I was speaking about [the brakeman] said 'Just squat down there,' and I said, 'I can't get off on the dump, for they have stopped over a trestle,' and he said, 'squat on the steps,' and I loosed my pants and had the rail by my left hand, and the train gave a jerk, and I fell to the trestle, and from there to the ground, and that's all there is to it." He testified also to material injury resulting from the fall. His collar bone and one rib were broken, and his arm was severely hurt.

Appellant contends that the railroad company was guilty of negligence in failing to provide a closet for the use of passengers, and that he should recover damages on that account. Freight trains are not equipped for the carriage of passengers, and public carriers are not required to equip them for that purpose. *Railway v. Canman*, 52 Ark. 517, 13 S. W. 280; *Krumm v. St. L., I. M. & Sou. Ry. Co.*, 71 Ark. 590, 76 S. W. 1075; *Chicago & A. Ry. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313. "A passenger riding in a freight train or a mixed train must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train." 4 Elliott on Railroads, § 1629. Hutchinson on Carriers, p. 616; 1 Fetter's on Carriers of Passengers, pp. 33, 34; *Olds v. New York, etc., Ry. Co.*, 172 Mass. 73, 51 N. E. 450. But where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train. Hutchinson on Carriers, p. 614; 1 Fetter's on Carriers of Passengers, p. 585; *Erwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. 88; *Chicago & A. Ry. Co. v. Arnol*, supra. Judge Thompson states the rule thus: "We find the courts are agreed upon the proposition that, where a railway carrier carries passengers upon its freight trains, it thereby assumes toward them the relation of a carrier to his passengers, and while, in such a case, it is a reasonable conclusion that the passengers assumes the increased risk incident to the operation and management of such trains, yet, subject to this qualification, the railroad company

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becomes bound in favor of the passenger by all the obligations of a common carrier upon a regular passenger train." 3 Thompson on Negligence, § 2901. Moreover, if it be held that it was the duty of the company to provide closets, the omission to do so cannot be said to have been the proximate cause of the injury complained of by appellant.

We think, however, that there was evidence from which the jury might have found that the conductor knew of the perilous position of appellant, and could have prevented the injury, either by warning him of the danger, or by holding the train at a standstill. If the conductor was aware of his peril, and could by the exercise of ordinary care have warned him, and failed to do so, or could by the exercise of such care have prevented the sudden movement of the train which threw appellant off, and failed to do so, the company is liable for the injury. Appellant testified that the conductor saw him go down the steps, and said, "You are in a hurry." Whether the conductor meant that appellant was in a hurry to debark, or to relieve himself from the steps of the caboose, does not appear; but the testimony shows that the conductor went into the caboose, and the jury might have found that he knew appellant was in a position of danger on the steps with the caboose on a trestle 20 feet high. They might also have found that the conductor heard the brakeman direct appellant to "squat down on the steps," and knew that he was about to relieve his bowels in that position. If so, he should have warned appellant of the danger, or exercised some care to prevent the train from suddenly moving. At least the question of his knowledge of appellant's position and care exercised to protect him should have been submitted to the jury under proper instructions. This court has repeatedly held that, notwithstanding the negligence of the injured person in putting himself in a perilous position, whether a passenger or a trespasser on the track, if the direct cause of the injury is the omission of employees of the railroad company, after becoming aware of his peril, to use a proper degree of care to protect him, the company is liable. *L. R. & Ft. Smith Ry. Co. v. Pankhurst*, 36 Ark. 371; *Same v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *St. L. & S. F. Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *St. L., I. M. & Sou. Ry. Co. v. Evans* (Ark.) 86 S. W. 426; *L. R. T. & R. Co. v. Kimbro* (Ark.) 87 S. W. 121, 644; *K. C. Sou. Ry. Co. v. McGinty* (Ark.) 88 S. W. 1001.

The court erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

CHICAGO & A. R. Co. v. WALKER.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 520.]

Carriers—Who Are Passengers.*—Where plaintiff held the return coupon of a ticket purchased from a railroad company, and went to the depot to take a train, she was a passenger entitled to all the privileges of one.

Same—Waiting Room.†—A railroad company must furnish a suitable waiting room for passengers and keep the same open for all regular trains and for trains which stop on signals.

Same.—Where a passenger on going to the depot finds it locked, she is not a trespasser where she enters the room, which is opened and lighted by one not an agent of the company.

Same — Negligence — Dangerous Premises.*—A passenger came to defendant's station at night with a ticket, and was admitted to the room by the village marshal, who unlocked the door, and was injured by falling through a hole in the waiting room floor, which had been there a long time. Held to make the question of defendant's negligence one for the jury.

Evidence—Demonstrations.—Where a physician testifies as to the injury to plaintiff's ankle, he may use a skeleton for the purpose of explaining the same to the jury.

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541; *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Garvey v. Rhode Island Co.* (R. I.), 15 R. R. R. 30, 38 Am. & Eng. R. Cas., N. S., 30; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25.

†For the authorities in this series on the subject of the duties of a carrier of passengers with respect to the furnishing and maintenance of waiting rooms for passengers, see *St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793 (duty to heat waiting room); *St. Louis S. W. Ry. Co. of Texas v. Ricketts* (Tex.), 5 R. R. R. 467, 28 Am. & Eng. R. Cas., N. S., 467 (duty to heat and light depot); note, 2 R. R. R. 136, 25 Am. & Eng. R. Cas., N. S., 136 (duty to provide and light); note, 19 Am. & Eng. R. Cas., N. S., 497 (duty to light); *Page v. Louisville & N. R. Co.* (Ala.), 21 Am. & Eng. R. Cas., N. S., 1 (duty to maintain); *Missouri Kansas, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 179 (liability for incivility and discomfort to passenger at station); *Wilson v. Duluth St. R. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 53 (duty of street railway to provide); *Louisville & N. R. Co. v. Keller* (Ky.), 12 Am. & Eng. R. Cas., N. S., 89 (duty to provide).

For the authorities in this series on the subject of a carrier of passenger's duties with respect to providing and maintaining stations and other stopping places, see foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 38 Am. & Eng. R. Cas., N. S., 52; *West v. St. Louis S. W. Ry. Co.* (Mo.), 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855.

For the authorities in this series on the subject of the duty to keep stations and depots open for the accommodation of passengers, see foot-note appended to *Draper v. Evansville, etc., Co.* (Ind.), 18 R. R. R. 255, 41 Am. & Eng. R. Cas., N. S., 255.

Chicago & A. R. Co. v. Walker

Appeal from Appellate Court, Second District.

Action by Anna Sloan Walker against the Chicago & Alton Railroad Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

This is an action on the case, brought by appellee against the appellant, to recover for personal injuries alleged to have been sustained by reason of catching the heel of her shoe in a hole in the floor of appellant's depot at Braceville, Ill., causing her to fall out of the door onto the platform. On May 8, 1903, the appellee lived at Gardner, and purchased a round-trip ticket to Braceville for the purpose of visiting her brother. She intended to return to her home upon a train which left Braceville at 11:02 p. m. Her brother and two little girls accompanied her to the depot, which they found dark and locked. The train which she expected to take stopped only upon signal, and her brother had taken a lantern for this purpose. Shortly after their arrival the village marshal came to the depot and unlocked the door of the waiting room with a key which he had in his possession. The party entered the room, and the marshal lit a lamp or lantern which was in the room. When the train whistled, the brother and the two children went out on the platform, and were followed by the appellee and the marshal. There was a hole in the floor of the waiting room, about two inches wide and several inches long, opposite and near the door, and as appellee passed out the heel of her left shoe caught in the hole, and she fell through the door to the platform and was injured. Upon a hearing before the court and a jury judgment was rendered in her favor for \$4,000, which has been affirmed by the appellate court, from which order of affirmance this further appeal has been prosecuted.

C. W. Brown, for appellant.

E. L. Clover, for appellee.

WILKIN, J. (after stating the facts). At the close of appellee's evidence, and again at the close of all the evidence, the defendant made motions to instruct the jury to find it not guilty, which were refused, and that ruling is assigned as error. As often said, the only question for our consideration under this assignment is whether or not there is any evidence at all in the record fairly tending to support the verdict. There is no substantial conflict in the testimony, which shows that on the morning of the accident appellee purchased a round-trip ticket from appellant's agent, as stated above. She used half of the ticket, and had the other half in her possession when she, her brother, and the children went to the depot. She was therefore at the depot rightfully as a passenger, and was entitled to all of the rights and privileges of the same. *Wabash, St. Louis & Pacific Railway Co. v. Rector*, 104 Ill. 296; *Illinois Central Railroad Co. v. Treat*, 179 Ill. 576, 54 N. E. 290. The train did not stop at that station, except upon signal, and the depot was dark

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and the door locked. Her brother started to find the marshal, indicating that he knew how to get into the depot at that time, and that the officer had a key. How he knew this fact does not appear, nor is it material. The marshal came before he was found by the brother, and opened the door with the key which he had in his possession, as above stated. He testifies that he received the key from his predecessor in office the 3d day of May of the same year, and that two or three days afterward he again received it from the station agent of the defendant. He was then asked what the agent said to him at the time the key was delivered to him, what his habit and custom was with reference to passengers waiting at the depot for this train, whether he was in the habit of opening and lighting the station for passengers before the day in question, and whether he received any compensation from the appellant for such services; but objections were sustained to all these questions. The station agent testified that he did not know the marshal had a key and he never had any conversation with him in reference to it, and that no arrangements were made by the defendant for passengers waiting for this train. He also testified that on at least two occasions during his service for the company he had seen light in the depot after he had closed and left it for the night, and he made no inquiries as to how these lights came to be there. He was asked if he did not state in a certain conversation that the marshal offered him the key on one occasion and said he did not want to keep it any longer, and answered: "It is true and isn't true. I did not say that." The evidence shows, without contradiction, that the hole in the floor had been there for a long time, and the station agent himself testified that he had seen it at least 300 times each day. The appellant claims that the evidence fails to show that the marshal had authority to open the depot building, and that it is not, therefore, responsible for his act in doing so; that, if the door had not been opened, the injury would not have occurred. There was certainly some evidence fairly tending to prove that the marshal had the key to the waiting room and opened the door with the knowledge and consent of the defendant. In fact, we think the evidence fully justified the jury in reaching that conclusion. It was the duty of the appellant, under the law, to furnish a suitable waiting room for its passengers, and to keep the same open for all trains which stopped there, either regularly or on signal, to receive passengers. The room in question was provided for that purpose, but a dangerous hole was allowed to remain in the floor, which must have been known to render the floor dangerous to persons using the room. Appellee was rightfully in the room. She was in no sense a trespasser or an intruder therein. When the door was opened, she had a lawful right to enter, without questioning the authority of the person who opened it. There is nothing to show that she was not in the exercise of due care for her own safety or was in any way to blame for the accident. Evidence was offered by the plaintiff to prove the particular circumstances and conditions under which

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the key was left with the marshal, a part, at least, of which was, we think, improperly excluded. Notwithstanding the exclusion of such testimony, there was sufficient evidence tending to support the plaintiff's cause of action and the verdict of the jury. The court, therefore, properly refused the motions to withdraw the case from the jury.

Physicians who testified on behalf of the plaintiff were permitted, over the objection of the defendant, to use the skeleton of a human foot in explaining to the jury the location of the various bones and ligaments of the ankles; and this, it is said, was error, though the point does not seem to be seriously urged. We think the ruling of the court in that regard was unobjectionable. The skeleton itself was not offered in evidence, but was simply used by the expert witnesses to illustrate their testimony. The court might, in its discretion, have permitted the plaintiff to exhibit her injured ankle to the jury, and allowed physicians to explain from it the nature and character of the injury. *Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. 1038; *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 670. It was equally proper to use the skeleton for the purpose of explaining the testimony. Even if the skeleton has been improperly used, no substantial injury could have resulted therefrom to the defendant, as its counsel had full opportunity to cross-examine the witnesses.

Complaint is made on the refusal of the trial court to give to the jury three instructions asked by appellant. The first was intended to tell the jury, that there was not sufficient evidence to authorize them to find that the marshal had authority to open and light the station. It was very properly refused. There being evidence tending to prove that fact, the question was for the consideration of the jury, and not within the province of the court. The second and third were to the effect that if the appellee entered the station after the same had been locked, through a door which had been unlocked by some other person than an authorized agent of appellant, then appellee cannot recover. The refusal of these two instructions was not error, for the reason that the court did, at appellant's request, instruct the jury that if the depot was not opened by authority of defendant, and plaintiff entered the waiting room without authority or invitation or consent of defendant, she could not recover. This was substantially the same proposition embraced in the two instructions refused, and was fully as favorable to the company as the law would justify.

It is suggested that the amount of damages awarded is excessive; but, as this is a question conclusively settled by the judgment of the Appellate Court, it is not open to inquiry here.

We find no reversible error in the record, and the judgments of the circuit and appellate courts will be affirmed.

Judgment affirmed.

BASS v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of Michigan, Dec. 4, 1905.)

[105 N. W. Rep. 151.]

Carriers — Passengers — Termination of Relation.* — Where a passenger is sleeping when the train arrives at his destination, and those in charge of the train, knowing it to be the passenger's destination, fail to awaken him and acquaint him with the fact, his failure to leave the train immediately does not terminate the relation of passenger and the carrier's duty to him as such.

Grant, J., dissenting.

Argued before MCALVAY, GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ.

C. E. Cowgill (*M. L. Howell*, of counsel), for appellant.
Burns & Sweet, for appellee.

HOOKER, J. The plaintiff, a young man residing at the time at Kalamazoo, purchased an excursion ticket to Benton Harbor over the Michigan Central and defendant's roads. On the return trip the plaintiff rode in the smoking car, and a number of passengers in that coach were riotous and disorderly, to a degree that merited severe measures in suppressing their disorder. An altercation with the conductor resulted, and, while the train stopped at the last station but one on the trip, one of the young men procured an ax helve, and it was carried on the car to Niles, where the plaintiff and other young men were to change cars, having to walk a distance of several blocks to take the Michigan Central train. The conductor was warned of the intention of the young men to attack him. They waited some 10 or 15 minutes and until he had signaled the train to start, when they closed about him and one of their number asked his name and entered into conversation with him. At the same time another approached him and lifted the ax helve in a way that led the conductor to believe that a blow was intended, whereupon he wrested the ax helve from him and swung it around. Most of the crowd had stepped back in time to avoid the blow, but the plaintiff was hit on the head and the scalp was cut for two inches. At the time the conductor was so close to the train that it nearly rubbed his back as it moved off. He caught on the train and went with it. There is little, if any, room for controversy about the foregoing statement. The preconcerted arrangement and attack upon the conductor is scarcely denied, and the claim that the plaintiff was not of the party, but was casually passing at the time, strikes us as so improbable, and the verdict is so excessive, that we should unhesitatingly set aside the verdict as contrary to the law and the evidence, did the record permit.

*For the authorities in this series on the subject of the duty to awaken passengers, see foot-note appended to *Seaboard Air Line Ry. v. Rainey* (Ga.), 16 R. R. R. 655, 39 Am. & Eng. R. Cas., N. S., 655.

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The judge's reasons for denying the motion are not shown, as required by law.

The plaintiff claims that he was asleep when the car reached Niles, and that he so remained until some person came into the car, a few moments before the train left, and aroused him; that he did not loiter, but went immediately out, and was going away when struck. This raised a question of fact as to his participation in the attack upon the conductor, which it was necessary to leave to the jury. Hence we cannot say that it was conclusively proved that he was one who either participated in or loitered to see the attack. It is claimed by defendant's counsel that it was the duty of the plaintiff to be awake, and immediately alight and depart when the train stopped, and, failing to do so within a reasonable time, the relation of passenger had ceased, and the defendant owed him no duty of protection. This question was left to the jury, and the defendant claims it should have been determined by the court. The declaration is a count for negligence, and counsel claim that, if it be found that there was a question of negligence in the case, the jury should have been instructed that plaintiff could not recover by reason of his contributory negligence (1) in not being awake and leaving the train and premises promptly, and (2) in getting in so close proximity to the parties engaged in the altercation as to be struck, when the immediate attacking parties escaped. We fail to find any illusion to the question of contributory negligence upon the trial. Not once was attention called to such a question. At any rate it is not pointed out to us, and we have not discovered it.

It is true that voluminous requests to charge were presented, in which the effect of plaintiff's delay was given prominence; but, while the effect of such delay upon his right to protection as a passenger was given prominence, there was nothing to indicate that the doctrine of contributory negligence was in the mind of counsel. The court did not give these requests, but he did instruct the jury, in effect, that the plaintiff was required to depart in a reasonable time under all the circumstances, and, if he did not, could not recover. He refused however to instruct that a failure to keep awake and to leave the train immediately would necessarily deprive him of his right to protection as a passenger. We are not cited to any case which holds that a failure to leave the train immediately by a passenger who is sleeping terminates the relation of passenger and the carrier's duty to a passenger, where those in charge of the train, knowing it to be his destination, have failed to awaken him and acquaint him with the fact that he should alight.

We have endeavored to examine critically the assignments of error raised, and fail to find one which calls for a reversal of the judgment. It is therefore affirmed.

MCALVAY, BLAIR, and MONTGOMERY, JJ., concur.

BOTTUM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, Oct. 7, 1905.)

[51 S. E. Rep. 985.]

Carriers—Loss of Freight—Damages.*—Where a box of pictures was shipped with a lot of household effects and billed as glass, in the absence of actual fraud, the carrier is only liable for the value of a box of household glass.

Same.*—Where pictures are shipped in a box marked "Glass," the carrier is not required to inquire into the nature and value of the contents of the box.

Same—Evidence.—In an action against a carrier for the loss of a box of goods, evidence as to its contents is admissible.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Action by Bertha C. Bottum against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

S. J. Simpson and *M. F. Ansel*, for appellant.

W. G. Sinnie, for respondent.

WOODS, J. On May 16, 1903, the plaintiff, Mrs. Bertha C. Bottum, had a lot of her household goods packed by H. B. Graves, a large dealer in furniture and pictures, and shipped by him from Rochester, N. Y., to Greenwood, S. C. One box containing a pastel portrait of Mrs. Bottum's deceased husband and a valuable landscape painting was lost on defendant's road, and this action was brought to recover the value, \$377.50. Mrs. Bottum's agent, in making the shipment, marked the box containing these pictures "Glass, with Care." The bill of lading was for "household goods," but the kind of goods in each package, except "three trunks crated," was specified. The box of pictures was included in the description, "3 box glass"; the other two boxes really containing glass. The defendant's freight charge on glass was 1½ times first class. On pictures the charge was three times first class, the value being over \$50 and not exceeding \$200, and a special contract was required when the value was over \$200. These rates and requirements, it seems, had been approved by the Interstate Commerce Commission. The packers testified they had always received from consignors pictures marked as glass, and always so marked them in shipping; but there was no evidence that the defendant or any other railroad ever acquiesced in this misdescription. The defendant denied liability for the value of pictures shipped in a box represented by the marks on the box as glass, for which it charged and received a lower rate of freight.

1. The circuit judge charged: "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment

*See note, 11 R. R. R. 427, 34 Am. & Eng. R. Cas., N. S., 427.

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of the contents of the box. Now, if Mrs. Bottum was not guilty of any improper concealment of the contents of the box shipped, or the value thereof, it was the right and duty of the railroad company to inquire about the nature and value of the contents of the box; and, if it failed to do so, and the box has been lost, then the railroad company is liable for the full amount of the loss." In accordance with this instruction, the verdict was in favor of the plaintiff for the value of the pictures. There are a number of exceptions, but the case turns on the soundness of the proposition just quoted from the charge. It is manifest from the context that, when the circuit judge said, "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box," he meant there was no intention to defraud by concealment; for the defendant's claim of exemption rested entirely on the ground that it had been deceived as to the contents of the box by the untrue representation of the plaintiff's agent as to a fact recognized by the law as of great importance to the contract of carriage. More definitely, then, the question at issue is, was the circuit judge right in charging, as a matter of law, that in the absence of actual intentional fraud the carrier was liable for the value of pictures, marked "Glass" on the box and billed as "glass," because it was the duty of the railroad company to make further inquiry about the nature of the contents, and, having failed to do so, it could not avail itself of the misdescription?

It is quite true that, when a railroad company receives a package marked "Glass," and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass; but by no possible stretch could a pastel portrait or landscape painting be classed as glass. They may, as in this instance, have glass over them; but the glass cover, like the frame, is incidental, and usually of insignificant value compared to the picture. In marking the box the shipper expressly represented the box to contain glass, and it was, therefore, not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box to see for itself. It is known to all that for purposes of transportation goods are classified, and that several factors enter into the consideration, such as weight, bulk, value, and the risk of loss or injury. The carrier has a clear right to know the contents of packages offered for shipment, in order that he may fix his compensation and know his risk. The statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely; and, if the value or character of the article actually shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier or the risk or expense of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. This is merely the application of the

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familiar principle that a party to a contract is held only to that liability which falls fairly within the terms of the contract, and it makes no difference if an item which the other party wished to cover was omitted by his fraud or by his negligence.

It is said in Hutchinson on Carriers, § 213: "Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of the contents, if there be anything in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value." 6 Cyc. 380; 2 Kent, *603; Angell on Carriers, § 261; 5 Am. & Eng. Ency. Law, 345; Relf v. Rapp (Pa.) 37 Am. Dec. 528; Orange County Bank v. Brown (N. Y.) 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. 458; Dunlap v. International Steamboat Company, 98 Mass. 371; Shaacht v. Illinois Central R. Co. (Tenn.) 30 S. W. 742, 28 L. R. A. 176; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; Southern Express Company v. Everett, 37 Ga. 688; Id., 46 Ga. 307; Railroad Co. v. Thompson, 19 Ill. 578; Railroad Co. v. Shea, 66 Ill. 471; Railway Co. v. Collins (Ga.) 3 S. E. 416, 4 Am. St. Rep. 87; Railway Co. v. Moore (Ga.) 5 S. E. 769. These authorities, especially the leading case of Relf v. Rapp, are opposed to the instruction given by the circuit judge to the effect that marking and billing the box "Glass" was not a representation that its contents were to be classed as glass, and not as pictures.

The case of Rathbone v. Railroad Co. (N. Y.) 35 N. E. 418, relied on by respondent, is not applicable. There the bill of lading simply described the property as two boxes of marble, contents and value unknown, and contained a stipulation to the effect that no statuary would be carried by defendant, for the loss of which it would be liable, unless a memorandum was delivered, stating the character and kind of articles and their value, unless a proper extra price for the carriage and responsibility was paid. Shippers' agents informed defendant at the time of the shipment that the box contained marble statuary, and this was marked upon the box; also the words "Handle with Care." The statuary was found to be broken on delivery to the consignee, and it was held: "A nonsuit was error; that if defendant was fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observance

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of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment, and of defendant's negligence." There was, therefore, actual notice to the carrier of the contents of the box, which, as the court held, was obviously evidence of waiver of the conditions of the bill of lading. Here we perceive nothing to put the carrier on notice that the mark on the box did not truly state the nature of the contents; but, even if there was such evidence, it was the right of the defendant to have the question of waiver submitted to the jury.

The defendant offered evidence tending to show that the misrepresentation as to the contents of the package materially affected the burden and the consideration of the contract of carriage, and no evidence to the contrary was offered by the plaintiff. On principle, supported by the authorities above cited, the plaintiff was entitled under the evidence offered to recover as for the loss of a package of glass used for household purposes, the reasonable value to be fixed by the jury; and it was, therefore, error for the circuit judge to charge, as in effect he did, that the verdict should be for the plaintiff for the value of the pictures.

2. There was no error in admitting testimony as to the contents of the box. Without it the case could not be intelligibly tried.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

BURNS v. JOHNSTOWN PASS. RY. CO.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 564.]

Carriers—Injury to Passenger—Assumption of Risk.*—Where a passenger stands on the running board of a summer car when there is room inside, he assumes the risk.

Same—Contributory Negligence.*—Where a passenger, with knowledge that the running board of a summer car was in close proximity to the poles near the track, stood thereon after warning other passengers of the danger, and was subsequently hit by a pole and killed, he was guilty of contributory negligence.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Cambria County.

Action by Margaret J. Burns against the Johnstown Passenger Railway Company. From an order refusing to take off a non-suit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the running board of a street car, see foot-note appended to *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738.

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Donald E. Dufton and Robert E. Creswell, for appellant.

Percy Allen Rose, Forest Rose, and W. Horace Rose, for appellee.

ELKIN, J. Even if it be conceded that the defendant company was negligent in constructing and maintaining the poles supporting the trolley wires in too close proximity to the tracks, it does not necessarily follow that there can be a recovery in this case. The real question in dispute is whether the testimony shows such contributory negligence on the part of the deceased as will defeat plaintiff's claim in this action. The learned trial judge in the court below directed a compulsory nonsuit, which, on motion made, he refused to take off, from which rulings this appeal is taken.

The deceased was standing on the running board of an open summer car at the time the accident occurred. We have frequently said that the running board of a car is not intended for the use of passengers, except as a convenience in getting in and out of the car. A passenger who stands on the running board when there is room inside, or when it is reasonably practicable to go inside the car, assumes the risk of his position. *Bard v. Pennsylvania Traction Co.*, 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672; *Thane v. Scranton Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Bumbear v. United Traction Co.*, 198 Pa. 198, 47 Atl. 961. It follows, therefore, that a passenger who is injured while standing on the running board must show by affirmative testimony that it was not practicable for him to go inside the car before he can sustain an action for damages.

We have some doubt whether the evidence offered by appellant has met this standard of requirement, but, even conceding under the circumstances as disclosed by the testimony it was a question for the jury to determine whether it was practicable for the deceased to go inside the car, still there can be no recovery because of the negligence of the deceased in another respect. The danger, if any, from the poles could have been avoided by the exercise of reasonable care. Did he exercise the reasonable care required under the circumstances? The learned trial judge held that he did not. In this there was no error. The deceased had placed himself on the running board, where he assumed the risk of his position, unless he relieved himself by showing that it was not practicable for him to go inside, and, in addition, he knew of the close proximity of the poles to the tracks, and warned other passengers of the danger. Three or more passengers standing in front of him and one or more back of him passed the pole without being injured. These passengers were standing on the same running board, and were subject to the same danger, if such it was. They all avoided the danger of the poles about which the deceased had warned them, and it is clear he could have avoided it by the exercise of reasonable care. If he knew the danger, and he did, and could have avoided it by reasonable

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care, and of this there is no doubt, it was his duty to do so, and, having failed to perform his duty in this respect, he was guilty of contributory negligence, and there can be no recovery in this case.

Judgment affirmed.

MESTREZAT, J., dissents.

FREEMAN v. ATCHISON, T. & S. F. Ry. Co.

(Supreme Court of Kansas, April 8, 1905.)

[80 Pac. Rep. 592.]

Passengers — Tickets — Expiration.* — A ticket which contains no limitation as to time, either on its face or by reason of a regulation of the railroad company, may ordinarily be used at any time within the period fixed by the statute of limitations.

Same—Same—Same.† — It is competent for carriers of passengers to limit the time to which tickets of any class may be used, subject to the qualification that the limitation must be reasonable.

Same — Same—Same—Validity of Printed Condition.‡ — On a first-class local ticket, purchased for passage from one station to another about 40 miles distant, over a railroad upon which there was daily passenger service in each direction, was plainly printed the condition: "One continuous passage, commencing within one day from the date on back hereof." On the back in perforated characters was the date, "5—31—02." Held, that the condition constituted a part of the contract between the railroad company and the purchaser, and was binding upon him.

Same—Same—Same—Same.‡ — The fact that the purchaser did not sign the contract will not relieve him from its obligations, nor is its binding force lessened by the failure of the passenger to observe a reasonable condition plainly printed on the face of his ticket.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by E. V. Freeman against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dale & Amidon and J. L. Dyer, for plaintiff in error.

A. A. Hurd, O. J. Wood, Hurd & Hurd, and Houston & Brooks, for defendant in error.

*See note appended to *Boyd v. Spencer* (Ga.), 11 Am. & Eng. R. Cas., N. S., 247.

†For the authorities in this series on the subject of the validity of stipulation fixing time for expiration of passenger ticket, see foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52.

‡As to whether mere acceptance of a passenger ticket includes assent to its printed conditions, see foot-notes appended to *Mart v. Louisiana Western R. Co.* (La.), 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

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JOHNSTON, C. J. E. V. Freeman purchased a regular full fare ticket of the Atchison, Topeka & Santa Fe Railway Company, for passage from Argonia to Wichita, on May 31, 1902. On the face of the ticket there was printed the following condition: "One continuous passage, commencing within one day from the date on back hereof." On the back of the ticket, and in perforated characters, was the date, "5—31—02." For reasons of his own, the plaintiff did not take the trip on the day he purchased the ticket, but several weeks later he presented the ticket on a train, when he was informed by the conductor that the ticket had expired, and upon his refusal to pay fare he was expelled from the train. Although the plaintiff had carried the ticket in his pocket between the time of purchase and presentation, he states that he did not notice the limitation on its face, and was not aware that it was a limited ticket. He was a commercial traveler, and frequently purchased and used tickets like the one in question. In an action for damages the above facts were disclosed, after which the court held that the plaintiff was not entitled to recover damages, and directed judgment for the defendant.

It is insisted by the plaintiff that, as he paid regular first-class fare, he was entitled to an unlimited ticket, and that, as the limitation was not brought to his attention nor observed by him, it was without binding force.

A ticket which contains no limit as to time, either on its face, or by a regulation of the company, may ordinarily be used at any time within the period fixed by the statute of limitations. However, it is no longer open to controversy that, in the absence of statutory restrictions, carriers of passengers may limit the time within which tickets of any class may be used, providing always that the limitation is reasonable. In his work on Railroads, Judge Elliott tersely states the doctrine as follows: "The right of a railroad company to limit the time within which a ticket over its road shall be good is well settled. But the limitation must be reasonable. Subject to this qualification, a ticket may be limited even to a single day or to a particular train. A limited ticket is not good for passage after the time to which it is limited has expired, and, as a general rule, one who presents such a ticket, and refuses to pay his fare or produce a proper ticket, may be expelled from the train." 4 Elliott on Railroads, § 1598. There was no ambiguity in the condition expressed on the ticket. The date on the back was abbreviated, it is true, but it was in a form commonly used in business transactions, and one which a man of ordinary intelligence could not misunderstand. His signature was not attached to the contract, and he says that he did not notice the printed limitation in the ticket until it was refused; but the absence of his signature did not eliminate the condition, and he is bound by, and must take notice of, limitations plainly printed on the face of the ticket. No statement was made by the agent who sold the ticket with reference to the time when it

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might be used, nor anything said as to the character of the ticket which would mislead the plaintiff. There was daily service on the railroad between Argonia and Wichita, and hence it cannot be said that the condition limiting the time of use to one day from the time of sale was unreasonable. That condition being plainly expressed on the ticket, it will be presumed to have been consented to by the purchaser in the acceptance and use of the ticket itself. Among the authorities sustaining these views, the following are cited: *Dangerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. 405; *Railroad Co. v. Price*, 62 Kan. 327, 62 Pac. 1001; *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. 526; *Hanlon v. Railroad Co.*, 109 Iowa, 136, 80 N. W. 223; *St. Clair v. Railroad Co.*, 77 Miss. 789, 2 South. 957; *Texas, etc., Railroad Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841; *Southern Railway Co. v. Powell*, 108 Ga. 791, 33 S. E. 951; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; *Lillis v. Railway Co.*, 64 Mo. 464, 27 Am. Rep. 255; *Railway Co. v. Proctor*, 1 Allen, 267, 79 Am. Dec. 729; *State v. Campbell*, 32 N. J. Law, 309; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Boice v. Railroad Co.*, 61 Barb. 611; *Rawitzky v. Railway Co.*, 40 La. Ann. 47, 3 South. 387; *Coburn v. Railroad Co.*, 105 La. 398, 29 South. 882, 83 Am. St. Rep. 242; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Hutchinson on Carriers*, §§ 576-581; 1 *Fetter on Carriers*, § 285; 3 *Thompson on Negligence*, § 2599; 6 *Cyc.* 575.

The plaintiff contends that the limitation is not enforceable, because it was nowhere alleged in the petition that the company had a rule providing for such limitation, nor that the rule, if it existed, was reasonable. The existence of such a rule is of no importance where the limitation is written on the ticket itself. If the limitation had been a regulation of the company, printed or posted elsewhere, a question might have arisen as to whether due notice of the rule had been given, or that the company had sufficiently brought it to the attention of the plaintiff, to make it effective as to him. The limitation expressed on the ticket, which the plaintiff knew, or by reasonable diligence could have ascertained, constituted a contract between him and the company, and was binding alike upon both.

The court ruled correctly in sustaining a demurrer to plaintiff's evidence, and its judgment will therefore be affirmed. All the Justices concurring.

ELLER *et ux.* v. CAROLINA & W. RY. CO.

(Supreme Court of North Carolina, Nov. 28, 1905.)

[52 S. E. Rep. 305.]

Judgment — Merger — Splitting Cause of Action. — Where plaintiff brought an action against a railroad for damage to her baggage, which contained a bridal trousseau, and recovered judgment therefor,

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she could not thereafter maintain a separate action for mental anguish caused by the injury to her trousseau, but she should have collected all the damage to which she was entitled in her original suit.

Action—Joinder of Causes of Action—Parties and Interest Involved.—Under Code, § 267, authorizing the joinder of certain causes of action, but requiring the causes of action so joined to all belong to one of the classes specified and to affect all the parties to the action, a husband and wife cannot join their separate actions for damages for mental anguish caused by defendant's negligence and recover one sum in satisfaction of their several claims.

Damages — Remoteness — Mental Anguish.* — Mental anguish, experienced by a prospective groom on the damaging by a railroad of the wedding trousseau of his bride to be, was too remote a form of damage to entitle the groom to recover therefor against the railroad, which did not know of the intended marriage.

Appeal from Superior Court, Catawba County; Councill, Judge.

Action by Albert Eller and wife against the Carolina & Western Railway Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

On September 5, 1904, the feme plaintiff, then Dora Anderson, was a passenger on defendant's train from Granite Falls to Hickory. She had, as baggage, a valise of the kind usually known as a "telescope," containing clothing, letters, photographs, and other articles, which was checked to Hickory and should have arrived at its destination on the 5th of said month, but did not arrive until the evening of the 7th. The feme plaintiff was going to Hickory for the purpose of being married to her coplaintiff, Albert Eller, to whom she was at the time engaged. The wedding had been set for the morning of the 6th, but in consequence of the delay in receiving her baggage it had to be postponed until the 7th, as her wedding trousseau was in the valise. When her baggage was tendered to her she refused to take it, as the valise was torn and her clothes were wet and muddy and so badly damaged that they could not be used. She alleges that by reason of the premises she suffered great mortification and mental anguish, and seeks to recover damages on that account. It appears that she had already sued the defendant in an action for the nondelivery of her valise and the damage to the property. That suit was settled, and she received from defendant \$30, and the clothes were returned to her. At the close of the testimony,

*For the authorities in this series on the subject of mental suffering as an element of the damages in negligence cases, see foot-note appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724.

For the authorities in this series or in which the principal embraced in the third head-note of the principal case is involved, see foot-note appended to *Traywick v. Southern Ry. Co.* (S. Car.), 17 R. R. R. 678, 40 Am. & Eng. R. Cas., N. S., 678; *American Express Co. v. Jennings* (Miss.), 16 R. R. R. 546, 39 Am. & Eng. R. Cas., N. S., 546; *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525.

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the court, on motion of defendant, dismissed the action. Plaintiffs excepted and appealed.

Self & Whitener, for appellants.

J. H. Marion, T. M. Hufham, and Witherspoon & Witherspoon, for appellee.

WALKER, J. (after stating the case). The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of the single wrong or breach of duty. *Pierce on Railroads* (1881) 300, 301, and note 1. The rule is different where there is a continuing wrong, or the wrong is repeated, as in the case of a nuisance or trespass, or where there is a new trespass distinct from the original one. *Hale on Damages*, 77, 78. Generally speaking, the redress the law affords for the commission of a wrong is pecuniary compensation. Plaintiff may recover what we call nominal damages, which is really no pecuniary compensation, but which merely ascertains or fixes his right or cause of action. Lord Holt has well said: "Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little diachylon—yet he shall have his action; for it is a personal injury." *Ashby v. White*, 2 Ld. Raymond, 938 (Smith's L. C. 425). The idea here is, as we see, that there is damage in the contemplation of law, though the injury involves neither loss nor pain, because the man's right to be protected in his person and reputation has been violated. *Cooley on Torts* (2 Ed.) 69. "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against the party for some amount." *Denman, C. J.*, in *Clifton v. Hooper*, 6 Q. B. 468. It was held in *Fray v. Goules*, 1 El. & El. (102 E. C. L.) 839, that an attorney is liable for compromising his client's suit, contrary to instructions, even though it turned out that he acted with reasonable prudence and bona fide and for the actual benefit of his client, there being no loss whatever, much less an appreciable one. It is only when the gist of the action is damage that the maxim "de minimis non curat lex" applies, and that the law no longer distinguishes between no appreciable damage and no damage at all. *Hale, Damages*, 27, 28. In *Bond v. Hilton*, 47 N. C. 149, the court, in a full discussion of this question, says: "Wherever there is a breach of an agreement, or the invasion of a right,

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the law infers some damage, and, if no evidence is given of any particular amount of loss, it gives nominal damages by way of declaring the right, upon the maxim, 'Ubi jus, ibi remedium.' " And again: "In every contract implying a duty to be performed, the neglect of that duty gives, in law, a cause of action to the opposite party, under the above maxim, and when the law gives an action it gives damages for the violated right, and, if no actual damages be shown, the plaintiff is entitled to nominal damages." Where there is an invasion of another's right, the cause of action is the wrong, or what we technically call "the injury," which entitles him at least to nominal recompense to vindicate his right, and the consequences which immediately flows from that injury, in the way of loss or damage, are but matters of aggravation. Hale, Damages, 77. In *Fetter v. Beal*, 1 Salk. 11, plaintiff recovered damages for assault and battery by which his skull was broken, and afterwards, upon the falling out of a piece of his skull, he brought an action for additional damage. The former recovery was held to be a bar to the latter action. Holt, C. J., said: "As to the case of a nuisance by water dropping from the eaves of the house, every new dropping is a nuisance; but here is now a new battery, and in trespass the grievousness or consequence of the battery is not the ground of action, but is only the measure of damages which the jury must be supposed to have considered at the former trial." In the same case, as reported in 1 Lord Raym. 692 (and it appears to have been considered as a very important one and controlling as an authority), Lord Holt further says: "This is a new case, to which there is no parallel in the books. Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence, as that which in probability might have been the consequence of the battery, plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation or damages. In some cases the damage is the foundation of the action, as in the action by the master for battery of his servant, 'per quod servitium amisit'; but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence and must be intended to have been given in evidence in the former action, and that the jury gave damages for all the hurt that he suffered; for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened." Sedgwick thus states the rule: "It thus appears that fresh damages merely will not always give a fresh action, and a judgment in a suit founded on a single act of tort will be a conclusive bar to a second suit for the same injury, although harmful consequences have made themselves apparent subsequent to the first suit, as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim. Hence the statute of limitations runs

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from the time of the breach." 1 Sedg. on Damages (8th Ed.) § 84. He also states well the distinction between mere items of damage for a single tort and the repetition of the trespass or tort itself. "In the case of a personal injury," says he, "the act complained of is complete and ended before the date of the writ. It is the damage only which continues and is recoverable, because it is traced back to the act; while in the case of a nuisance, it is the act which continues, or, rather, is renewed day by day. The duty which rests upon the wrongdoer to remove a nuisance causes a new trespass for each day's neglect." 1 Sedg. Damages, § 88. The question is fully discussed and the distinctions clearly drawn, by Battle, J., in the leading case of *Moore v. Love*, 48 N. C. 215. See, also, *Hatchell v. Kimbrough*, 49 N. C. 163.

We do not decide that mental anguish is an element of damage in a case of this kind; but if, for the sake of argument, we concede that it is, the feme plaintiff could have had such damages as she was entitled to recover on that account included in her former judgment or settlement. Having elected not to do so, she is precluded now from claiming any such damages. Her right to them, if right she ever had, is merged in the former recovery. She could carve out as large a slice as the law allowed, but she could not cut but once. "No one should be twice vexed for the same cause" is a maxim of the law we are not disposed to disregard, and which it is well strictly to enforce.

Plaintiff Elbert Eller also asked for damages for mental anguish caused by defendant's negligence, and it is alleged in the complaint that the two plaintiffs "seek to recover one sum in satisfaction of their several claims for the causes herein set out." If plaintiffs had any invalid causes of action against defendant, they could not thus join them. Code, § 267. There was no formal objection taken to the misjoinder; but we notice it, so that attention may be called to this important provision of the law, which is mandatory, and intended to protect a substantial right of defendant, and not merely directory. Plaintiff Albert Eller has not stated any cause of action entitling him to recover damages. Those that he claims are, in any view of the case, entirely two remote. Defendant did not know of the intended marriage, and therefore could not have contemplated any damage to him, even if he would otherwise be entitled to recover. *Cranford v. Tel.*, 138 N. C. 162, 50 S. E. 585. The case cited settles the law against his contention.

No error.

BALL v. MOBILE LIGHT & R. Co.

(Supreme Court of Alabama, Nov. 15, 1905.)

[39 So. Rep. 584.]

Carriers—Passengers—Existence of Relation—Evidence.—On the issue of whether a small child, riding on a street car in company with his parent, but for whom no fare was paid, was a passenger, evidence of a general custom on the part of the street railway not to charge fare for the carriage of small children is competent.

Same—Who Are Passengers.*—A small child riding on a street car in company with his mother, who pays a fare for herself, is a passenger, although no fare is paid for such child, where there is a general custom on the part of the street railway not to charge fare for the carriage of small children.

Same—Questions for Jury.—Testimony that "there were about seven or eight passengers on the car, and [plaintiff] was one of the passengers," raises a question for the jury on the issue of whether plaintiff was a passenger or not.

Same—Injuries to Passengers—Negligence—Unusual Jerks.—Evidence that a street car was stopped with unusual suddenness and a jerk, and that by the sudden stopping of the car plaintiff was thrown from his seat and injured, raises a question for the jury on the issue of negligence in the manner of stopping the car.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Freddie Ball, by his next friend, against the Mobile Light & Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

McAlpine & Robinson, for appellant.

Gregory L. & H. T. Smith, for appellee.

DOWDELL, J. No questions on the pleadings are presented by the record for our consideration. The plea of not guilty was filed to the complaint, and on this issue alone the case was tried. Upon the conclusion of the plaintiff's evidence, the defendant offering no testimony, the trial court, at the request of the defendant, gave the general affirmative charge in its favor.

The plaintiff's evidence showed that the plaintiff was a child under four years of age, and at the time of the alleged accident was riding on the defendant's street railway car, accompanied by his mother, who had paid her fare as a passenger on said car. No fare had been paid for the child, and in this connection it

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *McCarter v. Greenville Traction Co.* (S. Car.), 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5; foot-note appended to *Kroeger v. Seattle Electric Co.* (Wash.), 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689; *St. Louis, etc., Ry. Co. v. Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541.

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was competent for the plaintiff to show a general custom on the part of the defendant not to charge fare for the carriage of children of plaintiff's age. And under such circumstances we think there can be no doubt of the existence of the relationship of passenger and carrier between the child and the defendant. In the present case there was evidence, however, tending to show that the plaintiff was a passenger, irrespective of proof of a custom above adverted to. Rufus Williamson testified that "there were about seven or eight passengers on the car, and this little boy, Freddie Ball, was one of the passengers." With this testimony in, the question of passengers *vel non* was a question for the jury.

There was evidence tending to show that the car was stopped with unusual suddenness and a jerk, and by the sudden stopping of the car the child was thrown from the seat and injured. On this evidence the question of negligence in the manner of stopping the car by the defendant's servant was one for the determination of the jury, and the court could not say as a matter of law that the defendant's servant was not guilty of negligence. It follows, therefore, that the court erred in giving the general affirmative charge for the defendant.

Reversed and remanded.

HARALSON, ANDERSON, and DENSON, JJ., concur.

 ZEIGLER BROS. v. MOBILE & O. R. Co.

(Supreme Court of Mississippi, Jan. 15, 1906.)

[39 So. Rep. 811.]

Carriers—Liability for Baggage—Termination.—Under Code 1892, §§ 3568, 3569, requiring carriers to receive and issue checks for baggage, and to safely keep baggage at the station until the owner thereof demands the same, and imposing a double liability for baggage, carelessly or willfully lost by improper handling, railroads are not absolved from liability for the handling and safe-keeping of baggage at once upon its reaching the point to which it is checked; but their duty as carriers continues absolute until the baggage safely reaches its destination and the passenger has had a reasonable time and opportunity to obtain it.

Same—Actions—Sufficiency of Evidence.—In an action against a carrier for the loss of baggage, the production by plaintiff of his check for the baggage, together with proof that the baggage has not been delivered, makes at least a *prima facie* case, and casts on defendant the burden of either producing the baggage or showing legal cause of exculpation from liability.

Same—Questions for Jury.*—What constitutes a reasonable time and opportunity for passengers to call for their baggage after its

*For the authorities in this series on the question what is reasonable time within which to call for a passenger's baggage, see monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1 et seq.; extensive note 21 Am. & Eng. R. Cas., N. S., 367 et seq.

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arrival at destination is a question of fact for the jury, dependent upon the circumstances of the particular case.

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Suit by Zeigler Bros. against the Mobile & Ohio Railroad Company for loss of baggage by fire. From a peremptory instruction for defendant, plaintiffs appeal. Reversed.

Leftwich & Tubb, for appellants.

J. M. Boone, for appellee.

TRULY, J. At the conclusion of the testimony on behalf of the appellants the appellee moved the court for a peremptory instruction, because the plaintiff had failed to make out their case, and the appellee was "not liable for the loss of this trunk, as plaintiffs' agent had failed to call for the trunk immediately on arriving at Okolona." This was granted, and plaintiffs appeal.

The facts giving rise to this litigation are as follows: Zeigler Bros. are merchants. W. B. Smythe is their traveling representative and salesman, carrying a large trunk of samples, the property of his principals. On the occasion in question, Smythe, being at Columbus and desiring to go to Okolona, presented his trunk to the agent of appellee at Columbus, paid the excess baggage fee charged, received a check for the trunk, and took passage for Okolona. The train on which he arrived at Okolona, and on which, his declaration avers, his trunk was also transported, reached that place about 7:30 p. m. Upon arriving at his destination the proof shows that Mr. Smythe delivered his check to the hotel baggageman and requested that the trunk be taken to the hotel that night. Owing to the lateness of the hour it was impossible to procure a delivery wagon, and, the trunk being too heavy for easy transportation by hand, it was left there to be delivered the following morning. That night the depot was burned by fire.

The law in our state regulating and prescribing the duty of railroad companies in handling baggage of passengers is found in sections 3568 and 3569, Code 1892. The section first mentioned requires the carrier to receive and issue a check for the baggage of every passenger who exhibits a ticket, and then provides as follows: "Upon the arrival of the train at the station to which any trunk or baggage is checked, to put it off at a reasonably convenient place to be provided for the deposit of baggage; and it is the duty of the railroad company to safely keep the trunk or baggage at the station, until the owner thereof or his agent shall demand the same. Section 3569 provides that, if baggage be "carelessly or willfully" injured or lost by improper handling or otherwise, the railroad company handling the same shall be liable to the owner in a sum "not less than double the amount of actual damage." These mandates of the law evidence an intention of imposing, not only a strict liability, but a high degree

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of care, upon railroad companies in handling the baggage of passengers; but they seem to have escaped consideration in the trial court. The law does not require of the passenger that he shall "immediately upon arrival" at destination remove his baggage. On the contrary, it is a matter within common knowledge that at many places, when passenger trains arrive during the night, and for many other reasons, it is practically impossible to secure baggage immediately upon arrival. To hold that railroad companies are absolved from all liability for the handling and safe-keeping of baggage at once upon its reaching the point to which it is checked would be to infringe upon the statute law and establish a rule too harsh and rigorous, in view of conditions attendant upon railway travel as it is known to exist.

It was manifest error to give the peremptory instruction in this case. The passenger produced his check for the baggage and proved that it had not been delivered. This made out at least a prima facie case for appellants. This cast on appellee the burden of either producing the baggage or showing legal cause of exculpation from liability. We do not here decide, because not necessarily involved, when, if at all, after arrival at destination, the relation of passenger and carrier ends and the liability of mere warehouseman accrues; but we do not hold that, until the baggage safely reaches its destination and the passenger has had reasonable time and opportunity to obtain it, the duty of the carrier is absolute.

We also hold that what constitutes reasonable time and opportunity must depend upon the peculiar circumstances of the particular instance, and is a question of fact to be passed on by the jury.

Reversed and remanded.

MARIAN J. LOONEY, administratrix of the Estate of James F. Looney, Deceased, Plff. in Err., *v.* METROPOLITAN RAILROAD COMPANY and WASHINGTON RAILWAY & ELECTRIC COMPANY.

(Argued December 14, 15, 1905, decided February 19, 1906.)

[26 Sup. Ct. Rep. 303.]

Street Railways—Negligence Towards Employee—Contributory Negligence.*—A street railway pitman, by unnecessarily touching the uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead current, relieves the company from liability for his death from the resulting shock, although the conductor of the car may have been negligent in permitting the trolley pole to come in contact with the trolley wire.

*For the authorities in this series on the question whether there can be a recovery for simple negligence where the person injured was guilty of contributory negligence, see foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; foot-note appended to *Feitl v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798.

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Street Railways—Negligence Towards Employee — Inference from Lack of Contributory Negligence.†—The existence of defects in the insulation which would render a street railway company liable for the death of an employee occasioned by a shock received in adjusting the leads connecting the motive power of a car with the overhead current can not be inferred from the presumption of the exercise of due care on the part of the person killed, although, in the absence of a leak in the insulation, no shock could have been received unless he had unnecessarily touched the uninsulated ends of the leads.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, entered on a directed verdict in favor of the defendants in an action to recover damages for the alleged negligent killing of the plaintiff's intestate. Affirmed.

See same case below, 24 App. D. C. 510.

The facts are stated in the opinion.

Messrs. Maurice D. Rosenberg, Alexander Wolf, and Simmon Lyon, for plaintiff in error.

Mr. J. J. Darlington for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court:

Action brought by plaintiff as administratrix of the estate of James F. Looney, deceased against the defendants, for damages for the death of her intestate, alleged to have been caused by defendants. Judgment went against plaintiff in the supreme court of the District of Columbia, which was affirmed by the court of appeals.

After the plaintiff had rested her case the court directed the jury to return a verdict for the defendants. The correctness of this ruling is the question in the case.

The declaration consists of four counts. The first three allege the employment of the deceased by each of defendant companies respectively. In the fourth the allegation is that he was rightfully and lawfully in the discharge of his duties.

Looney was employed as a "pitman" by the Washington & Great Falls Railroad Company (now the Washington Railway & Electric Company), and was, on the day of his death—July 28,

†For the authorities in this series on the question whether a presumption of negligence arises against the master where an employee is injured, see foot-notes appended to *Stewart v. Raleigh & Augusta, etc., R. Co. (N. Car.)*, 17 R. R. R. 811, 40 Am. & Eng. R. Cas., N. S., 811; *Fuller v. Ann Arbor R. Co. (Mich.)*, 17 R. R. R. 594, 40 Am. & Eng. R. Cas., N. S., 594; foot-note appended to *Baltimore & O. R. Co. v. State (Md.)*, 16 R. R. R. 399, 39 Am. & Eng. R. Cas., N. S., 399.

For the authorities in this series on the subject of the presumption of due care on the part of a person killed through alleged negligence, see foot-note appended to *Miller v. Boston & Maine R. Co. (N. H.)*, 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; *Rollins v. Chicago, M. & St. P. Ry. Co. (C. C. A.)*, 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; *Woolf v. Washington Ry. & Nav. Co. (Wash.)*, 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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1901—in one of the “plow pits” located on the lines of the company, near its terminus at Thirty-sixth street and Prospect avenue northwest.

The Metropolitan Company’s line connects at this point with that of the Great Falls line. The latter company uses the overhead system. By this system the power is conveyed to the car by means of a “trolley pole” attached to the top of the car and made to touch the trolley wire when used to propel the car. The Metropolitan Company uses the underground system by means of a “plow,” so called, projecting through a slot in the tracks to an underground current. The two companies have a trackage arrangement, whereby the cars of the Metropolitan Company run over the line of the other company. The cars of the Metropolitan Company, therefore, are equipped not only with a “plow” and mechanism for the underground system, but with a trolley pole and mechanism for an overhead system. To attach these mechanisms to their respective systems it is necessary to run a car over an excavation on the line of the Great Falls Company known as the “pit.” The “pitman” is thus enabled to remove the “plow” from a car to be transferred from the Metropolitan line to the Great Falls line, and adjust or attach the wires or “leads” necessary for the operation of the car over the Great Falls line. While doing this Looney was killed, the plaintiff contends, through the negligence of the conductor of the car in permitting the trolley pole to come in contact with the trolley wire, whereby a current of electricity was transmitted to the motive machinery. And this is the ground of negligence charged in the declaration. In every count it is alleged “before said intestate entered said plow pit it became the duty of the defendants, and each of them, to keep, or cause to be kept, the electric current so cut off from said pit as not to injure the said intestate; and the plaintiff says that said intestate, having entered said pit in obedience to said direction to him as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off, as aforesaid, said electric current from said pit while said intestate was therein for the purpose aforesaid, whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died.”

At the trial there was evidence given by the plaintiff of the arrangement between the defendant companies as to the exchange of cars, and to the relation of their respective employees. On this evidence the parties base opposing contentions, the defendants contending that the conductor and Looney were fellow servants, the plaintiff contending that they were not. Both of the lower courts sustained the contention of the defendants. The court of appeals besides intimated a belief that the testimony on behalf of plaintiff rather tended to show accident than negligence. If this be so, or if the evidence fails to establish whether the death was caused by accident or negligence, the judgment should be affirmed, and it will be unnecessary to decide whether

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Looney and the conductor were fellow servants. We will assume, for the purpose of the case, that they were not fellow servants.

The accident was seen by two persons, Margaret Mawson and Helen Gertrude Coon. The former testified that she was sitting in her room on the second floor of her house, which is on Prospect avenue, 75 feet or more from the "pit." She saw the car turn the curve from Thirty-sixth street into Prospect avenue, and "that the trolley pole was up and the trolley wheel against the overhead wire, all the time after the car got into Prospect avenue until it stopped over the pit; that while the car was coming from Thirty-sixth street down to the pit she saw Looney, the deceased, enter the pit through the south trapdoor. That after the car stopped over the pit she saw him go up under the car and take the plow off. That after he took the plow off she saw him go up under the car again and put the wires up in the car to connect with the overhead trolley, and that while he was in that position she heard him holler and drop down, and the motorman turned and said, 'For God's sake, fix that trolley!' and the conductor then pulled the trolley down, but did not do that before that time. . . . That the accident did not happen until after the car had stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires. That she saw the movements of the deceased under the car through the trapdoor. That she could see his hands taking off the plow; could see nothing but his hands then; that after he took off the plow and went up under the car, she could see a part of his body above the surface of the street. That the pit was deep enough for a man to stand up in; that she heard no bell ring, nor signal of any sort; her hearing was good enough to hear a bell if one had been rung. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock."

Helen Gertrude Coon testified that she was a daughter of the preceeding witness and lived with her; that she saw the accident from the front porch of the house, which was about on the level with the sidewalk of the Prospect avenue. She saw the car run around the curve from Thirty-sixth street, come down the avenue, and stop over the pit. She was not certain whether the pole was touching the wire before the car stopped over the pit, but the pole was touching the wire or came in contact with it while deceased was taking off the plow. "That her attention was directed to the fact of the trolley being in contact with the wire from the fact that the deceased gave a groan, and the motorman said 'For God sake, pull that trolley down!' That some one said 'Pull the car off the pit!' That she saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan. That she heard no bells or signals given. That he had to use his hands to remove the plow and also to put the overhead current on, and she saw

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him twist his hands when he got the shock. That she saw all this while looking under the car from where she was sitting on the poarch. That they took the body up out of the pit over which the car had been standing."

A passenger on the car testified that he heard one bell ring, and immediately the conductor took the rope that holds the trolley in his hands, but he did not notice him do anything else. In about a minute and a half there "was a groan down in the hole and he jumped down and saw the man lying on his face. He heard some one say "For God's sake, hold the rod down; pull the pole down!"

Another witness testified that he lived on Prospect avenue, and was in front of his house, lighting the fire in his automobile. He did notice the car before it stopped. While it was standing over the pit he heard an exclamation and a groan, and some one said "Pull that trolley down!" After the exclamation he looked up and saw the trolley against the wire. He was about 75 feet from the car.

Another witness testified as to the manner of adjusting the plow and "leads," and the way a shock could be received by the pitman. It was to the effect that the wires used to connect the motive power with the overhead trolley are called "leads." Where the pitman takes hold of them to adjust them they are insulated by a covering of india rubber; but at the ends where they connect with other wires they are uninsulated, and have to be so in order to take the current. If the pitman takes hold of them at the right place and there is no leak, he would not be shocked, even though they were connected with the trolley. "Wear and tear," a witness said who was experienced in removing and adjusting plows and wires, "will cause a leak in the insulation. A leak is when the electricity comes through a hole in the insulation, caused by the wear and tear or from the insulation being old or imperfect."

The same witness also testified "that the company furnishes gloves in the pit with which to handle live plows and wires. But it is not customary or required to use the gloves except upon rainy days. On bright days, the car, when over the pit, is supposed to be 'dead,' and you don't take off the plows with gloves; you can't half do your work with them. That danger from electricity is increased from perspiration, rain, or other moisture. That the day of the accident was a bright, sunshiny day. The accident occurred between two and four o'clock p. m."

If the trolley was on before the plow was disconnected and removed, the plow would be charged with the full voltage on the line.

A witness who had experience with the construction of electric railway systems, and was familiar with the actions of electricity generally, and had experienced in superintending the work of disconnecting a plow from an electric car and adjusting the wires to move an overhead system, testified that, in his opinion as an

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expert, it would be the duty of a conductor to keep the trolley off the wire until he received some signal from the man beneath the car.

(1) It will be observed that the deceased did not meet his death while removing the plow. Of this the testimony leaves no doubt. (2) He received the electric shock while adjusting the leads. It follows from the first proposition that the trolley pole was not in contact with the trolley wire when the plow was removed. The argument of plaintiff assumes the contrary, and, indeed, is based entirely on the assumption that the deceased received his death stroke when removing the plow.

Two questions arise on the second proposition. The leads are insulated except at the ends that go into the connection; they are necessarily uninsulated there in order to take the current. But it was not necessary for the deceased to touch the uninsulated parts in making the connection, and, unless touched, no shock would have been received, even though they had been connected with the current by reason of the trolley being in contact with the wire, unless there was a leak in the insulation arising from defective construction or wear and tear in use. Granting, therefore, that the conductor was negligent, one of two things was necessary to cause the accident,—a leak in the insulation, or the act of the deceased in touching the uninsulated ends of the leads. Either one or the other was a necessary condition. If the first existed, the defendants may be charged with liability. If the second, they are exonerated. The burden of proof becomes a factor. The plaintiff in the first instance is not required to prove that the deceased was free from contributory negligence; in other words, the burden of proof of contributory negligence is on the defendant. But, on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown.

In *Texas P. R. Co. v. Barrett*, 11 Am. & Eng. R. Cas., N. S., 867, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707, the plaintiff (defendant in error in this court) was a foreman in charge of a switch engine, and was injured by the explosion of a boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The circuit court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover: that, besides the fact of explosion, he must show that the explosion resulted from the failures of the railroad company to exercise ordinary care either in selecting the engine or in keeping it in reasonably

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safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and insisted on by the plaintiff the boiler exploded and injured him, and the plaintiff was ignorant of the defects, and did not, by his negligence, contribute to his injury. Passing on these instructions, this court said that they laid down the applicable rule with sufficient accuracy, and in substantial conformity with the views of this court expressed in prior cases which were cited.

Plaintiff in the case at bar introduced no evidence whatever of a defect in the leads or that leaks were likely to occur, or the amount or degree of inspection necessary to discover them, or that there was an omission of inspection. The case was probably brought and tried on a different theory. It was argued in this court on a different theory. It was argued on the assumption that the deceased was killed when removing the plow. The assumption is directly in the teeth of the testimony. "The accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires." (Testimony of Margaret Mawson.) And to like effect is the testimony of Miss Coon. "She saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan." And she saw him "twist his hands when he got the shock."

The declaration does not charge a defect in the leads. It charges the negligence to have been in the failure "to keep, or cause to be kept, cut off" the electric current while the deceased was in the pit, "whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died." In other words, the cause of death was the negligent act of permitting the trolley pole to come in contact with the trolley wire.

But granting plaintiff is not limited by her declaration, nevertheless she has not satisfied the requirements of law in her proof. A plaintiff in the first instance must show negligence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which appeals one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. *Thomp. Neg.* § 401; *Baltimore & P. R. Co. v. Landrigan*, 11 R. R. R. 716, 34 Am. & Eng. R. Cas., N. S., 716, 191 U. S. 461, 48 L. Ed. 262, 24 Sup. Ct. Rep. 137; *Texas & P. R. Co. v. Gentry*, 4 Am. & Eng. R. Cas., N. S., 559, 163 U. S. 353, 41 L. Ed. 186, 16 Sup. Ct. Rep. 1104. But the negligence of a defendant cannot

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be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. *Douglass v. Mitchell*, 35 Pa. 440; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1.

Judgment affirmed.

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(Supreme Court of Appeals of Virginia, March 1, 1906.)

[53 S. E. Rep. 3.]

Malicious Prosecution—Requisites of Action—Termination of Prosecution.—A dismissal of a criminal case by the county court on appeal from a justice's judgment of conviction terminates the prosecution within the rule requiring a prosecution to end by an acquittal in order to entitle accused to maintain an action for malicious prosecution.

Same—Malice—Want of Probable Cause.—Malice in the instigation of a criminal prosecution may be inferred from want of probable cause.

Same—Absence of Probable Cause—Sufficiency of Evidence.—In a suit for malicious prosecution, evidence held sufficient to authorize a finding that no probable cause existed for the charge made by defendant against plaintiff.

Same—Advice of Counsel—Essentials of Defense—Burden of Proof.—In a suit for malicious prosecution, where the advice of counsel is relied upon as a defense, the burden is on defendant to show that he sought counsel with an honest purpose of being informed as to the law; that he made a full, correct, and honest disclosure to counsel of all the material facts in his knowledge bearing on plaintiff's guilt; and that he was in good faith guided by the advice of counsel in causing plaintiff's arrest.

Same—Sufficiency of Evidence.—In a suit for malicious prosecution, evidence held sufficient to authorize a finding that defendant's detective, who instigated the prosecution, had not made to the attorney who advised the prosecution a full, correct, and honest disclosure of the facts which he knew or should have known after a reasonably careful investigation bearing on defendant's guilt.

Same—Acts of Agent—Liability of Defendant.*—A detective employed by defendant, and on whose information alone a warrant for plaintiff's arrest was sworn out by defendant, is to be regarded as the agent of defendant in instigating the prosecution.

Buchanan, J., dissenting.

Error to Circuit Court, Norfolk County.

*For the authorities in this series on the question whether or not a railroad company can be held liable on account of arrests and prosecutions made or instigated by their employees or agents, see foot-note appended to *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479; foot-note appended to *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596.

Evans v. Atlantic Coast Line Ry

Action by A. H. Evans against the Atlantic Coast Line Railway. There was a judgment for defendant, and plaintiff brings error. Reversed.

Rehearing denied.

Herbert L. Britton and Jeffries & Lawless, for plaintiff in error.

Brooke & Elliott, for defendant in error.

KEITH, P. On the 23d of December, 1900, the Atlantic Coast Line Railway procured a warrant for the arrest of A. H. Evans, charging him with the larceny of a pair of shoes, the goods and chattels of the company. The prisoner was taken before a justice of the peace and found guilty. From this judgment he appealed to the county court of Norfolk county, where the case was continued, from time to time, until the 17th of July, 1901, when it was dismissed, and the prosecution finally terminated. Thereupon Evans brought suit against the Atlantic Coast Line Railway, charging it with having maliciously and without probable cause charged him with larceny and caused his arrest, and claiming damages.

This action was tried, and the jury rendered a verdict in favor of Evans for \$2,000, which was set aside as being contrary to the law and the evidence, to which order the plaintiff excepted and tendered a bill of exceptions which contains a record of the proceedings upon that trial, which was signed and made a part of the record. At a subsequent day the whole matter of law and fact was submitted to the court, which entered judgment for the defendant, and thereupon a writ of error was obtained from this court.

The only questions which we need to consider are those relating to the first trial. It is contended on behalf of plaintiff in error that the court erred in setting aside the verdict, that the jury had been properly instructed, and the evidence warranted their finding.

In *Scott v. Shelor*, 28 Grat. 891, it was held that in an action for malicious prosecution, to warrant a verdict and judgment for damages, it must be proved on the part of the plaintiff, first, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff; second, that it was instigated or procured by the co-operation of the defendant; third, that it was without probable cause; fourth, that it was malicious.

In *Graves v. Scott*, 104 Va. —, 51 S. E. 821, it was held that the first requirement is sufficiently met where it appears that the particular prosecution has ended favorably to the accused, that there need not be a final acquittal, but that the reasonable rule seems to be "that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

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That the prosecution in this case had ended, within the meaning of the rule, and that it was instigated and procured by the co-operation of the defendant, cannot be doubted.

Malice, it is said in *Scott v. Shelor*, *supra*, may be inferred from the want of probable cause, but want of probable cause can never be inferred from the plainest malice.

We shall, therefore, inquire next whether probable cause existed in this case to justify the defendant in error in the course which it pursued; and, if it shall be found that such probable cause did not exist, its absence will be sufficient to warrant the inference of malice.

The facts are as follows: Evans was employed by the Atlantic Coast Line Railway as a watchman at its Pinner's Point depot. A number of articles had been stolen from the custody of the railroad at that place, and it employed a Richmond detective to go down and make investigation, and, if possible, to discover the thief. The detective, acting upon information, went to a barroom kept by one Wilkins, and asked if certain packages had been left there by Evans. Wilkins replied that he was informed by Thomas, a colored employee, that three bundles had been left there by Evans, and thrown upon a top shelf in the barroom. These bundles were taken down. One of them contained a pair of old trousers, the second a pair of old shoes, and the third a pair of shoes which had been abstracted from the custody of the railway. Armed with these facts, the detective and the forwarding agent of the railway company consulted counsel, who advised them upon the facts communicated to him that there was probable cause for the arrest of Evans. Thereupon a warrant was sworn out against him, he was taken before a justice of the peace, found guilty, an appeal was taken to the county court, where it remained for some months, and was finally dismissed by the court.

The testimony for the plaintiff in error tended to prove the following facts: That in the latter part of September, or early in October, 1900, he had been down in North Carolina, where he had formerly resided, and that upon his return, which was not later than the 10th or 12th of October, he left three packages at the barroom of Wilkins, with the colored employee Thomas; that one of these packages contained an old pair of trousers, another an old pair of shoes, and the third a pair of new shoes which he had purchased when in North Carolina.

It further appeared that on October 13, 1900, a shipment of shoes was made by A. E. Nettleton, of Syracuse, N. Y., to Bullock & Fleming, of Montgomery, Ala., and that it was from this lot of shoes the pair was taken, with the larceny of which Evans was charged.

Shoes shipped by freight from Syracuse, N. Y., would not reach Pinner's Point in less than two or three days; or, however that may be, it is certain that shoes which were shipped from that point on October 13th were not at Pinner's Point on October

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12th. It is highly probable that they were not there for several days after their shipment. According to the testimony of Thomas, the only shoes belonging to Evans, left by him, or any one for him, at the barroom of Wilkins, were left not later than the 12th day of October.

It further appears that the depository of the shoes was not under the control of Evans, nor used exclusively by him; that it was a place in which, or at which, the patrons of Wilkins' barroom were in the habit of leaving packages; and that several were so left during the period covered by this investigation. Upon these facts we think the jury were warranted in finding that no probable cause existed for the charge made against Evans.

But it is said that the railroad is protected by the advice of counsel.

In order that such advice may be a shield against a suit for malicious prosecution, the burden is on the defendant to prove that he sought counsel with an honest purpose of being informed as to the law; that he made a full, correct, and honest disclosure to his counsel of all material facts in his knowledge bearing on the guilt of the plaintiff; and that he was in good faith guided by the advice of counsel in causing the arrest of the plaintiff. *Jones v. Morris*, 97 Va. 43, 33 S. E. 277.

When the detective went to confer with counsel as to the propriety of the arrest, he told him that he had found shoes which corresponded with the mark and the number of the shoes which had been shipped by Nettleton & Co. to Bullock & Fleming over the Atlantic Coast Line road; that he had found them at Wilkins' barroom; that Evans had a room there; that he was a watchman for the Atlantic Coast Line, and that he had a room there in which to sleep in the daytime, or the nighttime, when he was off duty; that the shoes were not found in Evans' room, but in Wilkins' barroom, but they had been left there by Evans for safekeeping; that he had not taken them upstairs to his room as a mere matter of convenience, saying that he would call for them. The attorney "inquired who would testify to that, or who would say that they were brought there by Evans, and the reply was that Wilkins or his man in the store had given him that information; that the shoes were not the only bundle that was left there at the same time, but there were two other bundles, one an old pair of trousers and the other an old pair of shoes; that they had all been left at the same time, and the trousers and old shoes and the new shoes had all been brought there at the same time and left by Evans." The attorney then made inquiry as to "whether it was certain that Wilkins, or Wilkins' people, would testify to the fact that the shoes had been brought there by Evans, if there was any doubt about that fact, and he was informed that there was not, and that these witnesses would testify to that fact." And thereupon the attorney said: "'Why, you have got a case that the law itself makes a case of prima

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facie guilt. Here the goods are stolen, and they are found in the possession recently of a party who has no title to them, and, as we lawyers call it, it is the recent possession of stolen goods which makes it a *prima facie* case'—and that the men should be arrested." In order to impress the importance of the fact upon the detective, the attorney told him that "it was a vital question that there would be testimony of Wilkins or his clerk that the shoes had been left there by Evans"; and he was assured that such testimony would be adduced.

The facts, as they appear in the record, upon that point are as follows: That, when the detective went to Wilkins, he was told that Wilkins knew nothing upon the subject, except what he had been told by Thomas. The detective in his testimony states that he went to Wilkins' barroom and asked if Evans had left any parcels there, and Wilkins replied that Thomas had told him that Evans had left some parcels there. These parcels were examined, and among them were found the shoes which had been stolen. He told Wilkins to keep the new shoes subject to his order and not to surrender them to Evans; and his testimony then proceeds:

"Was that the time you saw the negro Peter?

"I saw the negro that evening.

"You saw the negro after you left Wilkins?

"I waited there for him, and saw him that evening. I waited around there until I saw him. I had a talk with Thomas, and Thomas told me Peter was the one that brought them there, and I saw Peter, and he told me he went to Mr. Evans' boarding house and brought them there."

That is the only conversation which the detective claims to have had with Thomas. In a former part of his testimony he was asked with respect to the same occasion:

"Did you question Thomas?

"No, sir; I did not.

"Do you know, or did you inquire, when Evans had brought any shoes to Wilkins' barroom?

"Yes, sir.

"From whom did you inquire, and what answers did you receive?

"I got the message there that Peter had brought the shoes there. Mr. Evans had got Peter to go after these things, I think from County street, and bring them down to the bar, and then Peter stated to me that he carried the shoes there and that Mr. Evans got him to carry the carton boxes out in the back yard and burn them; but, as I told you before, that is hearsay evidence. I don't know whether Mr. Evans did that, but that is the information that Peter gave me after I got the shoes."

Thomas denies that he was ever questioned upon the subject by the detective, the detective both affirms and denies, and the jury, we think, may well have believed the statement of Thomas. Upon this vital question, therefore, as to who left the shoes at the

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barroom, the only evidence is that Wilkins told the detective that he had been told by Thomas that the shoes had been left there by Evans. Now, if the detective had made careful inquiry of Thomas, he would have learned that the packages to which Thomas referred had been left there not later than the 12th of October, and that the shoes which were charged as the subject of theft did not leave Syracuse until the 13th day of October. The detective says that he talked with Thomas, but Thomas denies this; and, if the detective ever examined him at all upon the subject, he must have done so in a very perfunctory manner, for he failed to elicit the important fact as to the date at which the packages had been left by Evans. Wilkins knew nothing except what he had heard from Thomas, and so informed the detective. The whole case, then, turns upon the statement of Thomas, who, as we have seen, denies that he was questioned by the detective, or that he made to him any statement whatever.

Upon this state of facts the jury found that there was no probable cause for suing out the warrant, and that there had not been a full, correct, and honest disclosure made to counsel of the material facts within the knowledge of the detective, or which should have been within his knowledge had he made a reasonably careful investigation bearing on the guilt of the plaintiff. It was solely upon the information of the detective that the warrant was sworn out, and he is, therefore, to be regarded as the agent of the railroad company.

The instructions given to the jury at the trial correctly stated the law, and the facts were sufficient to support the verdict. We are therefore of opinion that the court erred in setting it aside, and this court will proceed to enter such judgment as the circuit court ought to have entered.

BUCHANAN, J. (dissenting). I cannot concur in the opinion of the majority of the court. It seems to me the trial court properly set aside the verdict of the jury on the first trial, and that the judgment complained of should be affirmed.

Independently of the advice of counsel and of the fact that the plaintiff was convicted by the justice before whom he was tried, it seems to me the uncontradicted evidence in this case shows that, when the railway company instituted the prosecution complained of, it had knowledge of such a state of facts and circumstances as would excite the belief in a reasonable mind acting on such facts and circumstances that the plaintiff was guilty of the crime for which he was prosecuted. This being so, it had probable cause for its action, and is not liable in this case for damages, although it subsequently appeared that the plaintiff was not guilty.

If the facts and circumstances disclosed by this record are not sufficient to defeat a recovery in a suit for malicious prosecution, the public interests will suffer, for few persons will be willing to run the risk of being mulcted in heavy damages because of honest mistakes made in instituting criminal prosecutions.

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It does seem hard that a man may be prosecuted for a supposed crime, and yet have no redress against the prosecutor, and yet this must frequently be so, for the preservation of the peace and order of society requires that even the innocent may be compelled to submit to such inconvenience and hardship rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable cause to believe the accused guilty. Good faith on the part of the prosecutor is always an important, if not a vital, element of inquiry, and is always a sufficient justification, except where an unreasonable credulity is manifested in inducing the prosecutor to draw conclusions of guilt which persons of ordinary prudence and judgment would not have drawn. Newell on Malicious Pros. 269.

The prosecution complained of was, in my judgment, instituted in good faith and with probable cause, and the prosecutor should not be held liable for damages in this action.

HOUSTON & T. C. R. Co. v. TURNER.

(Supreme Court of Texas, March 12, 1906.)

[91 S. W. Rep. 562.]

Master and Servant—Injuries to Servant—Railroads—Assumed Risk.*—Where, in an action for death of a section foreman by being struck by cars moved onto a switch track, there was no evidence that, prior to the accident defendant's employees had habitually sent the cars on such side track at a speed greater than six miles an hour, deceased did not assume the risk of the operation of such cars at a higher speed than that specified.

Same—Departments of Work—Negligence of Employees of Other Departments.*—Where deceased at the time of his injury was not connected with the work of switching cars in defendant's yard, he did not assume the risk of injury from the negligent method by which members of the switching crews employed by defendant did the switching.

Same—Habitual Negligence.*—In general, an employee does not assume the risk of dangers growing out of the master's negligence or those for whom the master is responsible, however habitual such negligence may be.

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; foot-notes appended to *Cole v. St. Louis Transit Co. (Mo.)*, 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; *Florence & C. C. R. Co. v. Whipps* (C. C. A.), 17 R. R. R. 569, 40 Am. & Eng. R. Cas., N. S., 569; *Mace v. Boedker & Co. (Iowa)*, 17 R. R. R. 301, 40 Am. & Eng. R. Cas., N. S., 301; foot-note appended to *Dunn v. Oregon Short Line R. Co. (Utah)*, 16 R. R. R. 741, 39 Am. & Eng. R. Cas., N. S., 741; *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to *Philadelphia, etc., R. Co. v. Devers* (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366.

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Same—Trespassers.†—Where defendant railroad company had not provided any convenient closet for use of its employees, a section foreman was not a trespasser in passing over a side track on which he was struck and injured on returning from answering a call of nature.

Same—Care Required.‡—Where deceased, a railroad section foreman, was killed while passing over a switch track, where he had a right to be, in returning to his work, defendant's employees in switching cars on such track, were bound to use ordinary care to protect him from injury.

Same—Issues—Speed of Car.—In an action for death of a section foreman, by being struck by a car negligently operated on a switch track, evidence that when the car was struck by other cars being backed onto the switch track, it flew up off the track, and came down with the trucks on the ties, and was driven 15 or 20 feet on the ties, though the brakes were set, and that such effect could not have been produced except by terrific force, was sufficient to raise the question of excessive speed of the cars.

Trial—Instruction—Applicability to Evidence.—Where, in an action for death of a railroad section foreman, there was no evidence that he was in a place of safety when his foot slipped on the loose dirt prior to the injury, the only evidence on the subject being that he was then on the track, and endeavoring to get off the track, it was proper for the court to refuse a charge, on the theory of unavoidable accident, based on the contention that deceased, in attempting to get out of the way of the car, stepped on loose dirt, which caused his foot to slip, and his body to fall under the car.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Mollie Turner against the Houston & Texas Central Railroad Company. Judgment for plaintiff and defendant appeals. Judgment reversed (78 S. W. 712) and case certified.

Baker, Botts, Parker & Garwood, Sam R. Frost, and Skinner & Supple, for appellant.

J. E. Lancaster, J. A. Beall, and Templeton & Harding, for appellee.

†For the authorities in this series on the question who are, and are not, licensees on railroad tracks or premises, see foot-note appended to *Curtis v. Oregon R. & Nav. Co.* (Wash.), 17 R. R. R. 377, 40 Am. & Eng. R. Cas., N. S., 377; *St. Louis S. W. Ry. Co. v. Shiflet* (Tex.), 17 R. R. R. 373, 40 Am. & Eng. R. Cas., N. S., 373; *Elgin, etc., Ry. Co. v. Thomas* (Ill.), 17 R. R. R. 356, 40 Am. & Eng. R. Cas., N. S., 356; foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-notes appended to *Illinois Terminal R. Co. v. Mitchell* (Ill.), 16 R. R. R. 835, 39 Am. & Eng. R. Cas., N. S., 835; *Willis v. Vicksburg, etc., Ry.* (La.), 16 R. R. R. 590, 39 Am. & Eng. R. Cas., N. S., 590; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

‡For the authorities in this series on the question as to the care due an employee, see foot-notes appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; *Lewis v. Vicksburg, etc., Ry. Co.* (La.), 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; *Malott v. Sample* (Ind.), 17 R. R. R. 595, 40 Am. & Eng. R. Cas., N. S., 595; *DeMase v. Oregon R. & Nav. Co.* (Wash.), 17 R. R. R. 322, 40 Am. & Eng. R. Cas., N. S., 322.

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BROWN, J. The court of Civil Appeals of the Fifth District has certified 25 pages of statement from which we extract the following as pertinent to the questions propounded:

"William Turner was struck and killed by the cars of the Houston & Texas Central Railroad Company on November 20, 1901. He was a section foreman of appellant, and in charge of a gang of men at work in its switch yard in the city of Waxahachie. There were three parallel tracks in the yard a short distance apart running east and west. The north track was known as the passing track; the middle, as the main track; and the south track, as the elevator or mill track. The section men under the control of the deceased, William Turner, were engaged at the time of the accident in repairing or putting in what is called a cut-off track between the main track and the passing track on the north side of the main track. The yard crew were engaged in switching and transferring cars from one track to another. While this switching of cars was being done the deceased, Turner, went upon the elevator track, some 20 or 50 feet from where his men were at work, at or near the east end of a flat car which was standing on that track. While in this position the switch crew 'shoved' or 'kicked' back from the west onto the mill or elevator track some box cars, which by the impetus given them by the engine, rolled back eastward, struck the flat car, causing it to move suddenly forward against Turner, knocking him down and running over him, inflicting injuries upon him, from the effects of which, he died in a few hours. He left surviving him, Mollie Turner, his wife, who brought this suit to recover damages alleged to have been sustained by her on account of her husband's death. The defendant pleaded the general issue, contributory negligence, and assumed risk on the part of the deceased. From a judgment rendered in appellee's favor for the sum of \$5,000, the present appeal is prosecuted.

"The court charged the jury as follows: 'When a person enters into the employment of another, he assumes the risks ordinarily incident to such employment. He does not assume risks arising from the master's negligence; neither does he assume risks arising from the negligence of other employees working in another department of service, unless he knows of these risks. In no event does he assume risks arising from negligent acts of other employees working in a different department of service, which are unusual and extraordinary. You are further charged that on November 19, 1901, there existed an ordinance of the city of Waxahachie prohibiting the running of trains or cars, within the city limits, at a speed of over six miles an hour, and, in this connection, you are instructed that if you believe from the evidence that the car or cars kicked in onto the mill siding (if they were so kicked) were caused to run at a speed of over six miles an hour, and were so running at the time the flat car was struck (if it was), and that such speed (if it existed), caused the flat car to run on, against or over William Turner, producing

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and causing his death, then the plaintiff would be entitled to recover, unless you find that William Turner was guilty of contributory negligence as hereinafter charged.'

"Upon the issue of assumed risk, appellant requested the following charge, which was refused: 'In addition to the main charge just given you, you are instructed that if you believe from the evidence Wm. Turner knew, or had reason to believe, that the cars would probably be switched in from the main track upon the track known as the "elevator track," and that the usual and customary manner of placing cars on this track was by shoving or kicking them over the switch, with a speed at which the cars were then moved, and permitting them to run loose down the track disconnected from the engine, and to stop by force of gravitation without the application of brakes, and without any person on such loose car, or cars; and that he voluntarily went upon the track behind, or in front of the flat car for the purpose of his own personal convenience, and not on any business in the line, or pursuit of his employment, as section foreman, and that he knew the danger to himself by reason of his position when injured, and that he voluntarily assumed that position at a time when his presence at the point of danger was not required by his employers, then under such circumstances, if you find they exist, the said Turner assumed the risk of injury, and plaintiff would not be entitled to recover.'

"Appellant also requested the trial court to charge the jury as follows, which was refused: 'In addition to the main charge already given and read to you, you are instructed that if, under the circumstances existing at the time and place of the injury to Wm. Turner, the employees of the defendant operating the switch engine did not see Turner and did not expect, or anticipate his presence there, at the place where he was struck, and the bell of the engine was being rung at the time, then the defendant's servants owed the said Turner no further duty of keeping a lookout to discover and protect him from danger; and under such circumstances, if they exist, he received the injury, the defendant would not be liable in this suit.'

"Appellant requested the court to charge the jury in addition to the main charge as follows: 'If from the evidence you believe that Wm. Turner saw the cars which were at the time being shoved or kicked in upon the elevator track, approaching toward the flat car, which was standing on the track, and that to avoid the danger of the impact of the moving cars with the flat car, he stepped from the track to a place where he would have been safe, but that he stepped upon loose dirt, which caused his foot to slip, thereby causing him to fall, and that his slipping and falling was the cause of his being caught under the wheels of the car and injured, then no recovery can be had against the defendant, and your verdict should be in defendant's favor.'

"Question 1. Did the trial court, under the evidence, err in restricting and confining, by its charge to the jury, the issue of

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assumed risk on the part of the deceased, Turner, to such risks and dangers of which he had actual knowledge?

“Question 2. Did the court err in refusing to give in charge to the jury appellant’s requested charge on the issue of assumed risk quoted above?

“Question 3. Did the court err in refusing to give appellant’s above-quoted instruction, to the effect, that if, under the circumstances existing at the time and place of the injury to William Turner, the employees of appellant operating the switch engine, did not see Turner and did not expect nor anticipate his presence there, then appellant’s servants owed Turner no duty of keeping a lookout to discover and protect him from danger, and under such circumstances, if they existed, appellant would not be liable in this suit? In other words, if Turner voluntarily went near or upon the elevator track near the end of the flat car and where injured, to urinate or for some other purpose personal to himself, and not in discharge of some duty imposed by his employment and appellant’s employees switching the cars which caused his death did not see him and could not have anticipated his presence there, was it the duty of said servants to keep a lookout for him; or was it only the duty of said employees in such case, to use the means at their command to avoid injuring him after his peril was actually discovered?

“Question 4. Where the members of the switching crew relieved from the duty of using ordinary care to discover Turner upon the elevator track, by reason of the fact that he went there to perform a duty personal to himself?

“Question 5. In view of the evidence, did the court err in the twelfth paragraph of its charge in instructing the jury that ‘if the car or cars licked in onto the mill siding were caused to run at a speed of over six miles an hour, and were so running at the time the flat car was struck, and that such speed caused the flat car to run over the deceased, Turner, producing his death, plaintiff would be entitled to recover, unless Turner was guilty of contributory negligence?’ In other words, was the issue submitted in this charge raised by the evidence? If so, was the issue of assumed risk raised in connection therewith, and said charge erroneous in that it ignored such issue?

“Question 6. If in the switching of the cars in the Waxahachie yards they were propelled at a greater rate of speed than six miles per hour, in violation of an ordinance of that city, and it was usual and customary to move said cars at such greater rate of speed in the performance of the work and the deceased knew those facts or must have acquired knowledge of them in the discharge of his duties did said William Turner, under such circumstances, assume the risks incident to the moving of said cars at such a rate of speed and appellant would not be liable for an injury resulting to him by reason of negligence consisting of a violation of said ordinance?

“Question 7. Did the trial court err in refusing to give appel-

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lant's special charge quoted, upon the theory of unavoidable accident, based upon the evidence that deceased, Turner, in attempting to get out of the way of the flat car stepped upon some loose dirt, which caused his foot to slip, and his body to fall under the car?"

To questions 1, 2, 5, and 6, we make the following answer: The issue of assumed risk was not raised by the evidence, because (1) there was no evidence that tended to prove that prior to the accident the railroad employees had habitually sent the cars on the side track at a speed greater than six miles per hour; (2) the deceased was not connected with the work of switching the cars in the yard, therefore, he did not assume the risk of injury from the negligent method by which other employees of the railroad company did the switching. The proposition contended for by the railroad company is that if its employees were habitually negligent in the manner of handling the cars, and Turner knew the fact, he assumed the risk of injury from such negligence. As a general rule the employee does not assume the risk of dangers growing out of the employer's negligence, or the negligence of those for whom the master is responsible, however habitual it may be. To this rule there are exceptions, but the facts do not bring this case within any one of them. *Grace v. Kennedy*, 99 Fed. 679, 40 C. C. A. 69; *Schroeder v. C. & A. Ry. Co.*, 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Caron v. Boston & A. Ry. Co.*, 164 Mass. 523, 42 N. E. 112; *Hosic v. Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 683, 37 N. W. 963, 9 Am. St. Rep. 518; *Peck v. Peck*, 87 S. W. 248, 12 Tex. Ct. Rep. 748; *Seley v. Southern Pacific Co.*, 6 Utah, 319, 23 Pac. 751; *T. & P. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 31.

In the case of *Texas & Pacific Railway Co. v. Archibald*, before cited, the facts were, briefly: The plaintiff was a brakeman in the employ of the Texas & Pacific Railway Company at Shreveport, La., which company habitually received from the Cotton Belt Railway Company, without inspecting them, cars to be handled in the yard of the Texas & Pacific Company. In the course of his employment the plaintiff undertook to uncouple two oil tank cars, received from the Cotton Belt Railroad, then standing in the yard of the Texas & Pacific Company, and, on account of a defect in the coupling of the cars, he was injured. To his claim for damages the railroad company pleaded that he had assumed the risk of injury from such cause, because of the fact that it habitually received such cars without inspection. In disposing of the question the Supreme Court of the United States said: "Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employee to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employee knew or by diligence would have known, not of the dan-

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gers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court, not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles." In the case of *Hamilton v. Railroad Company*, before cited, the facts were: The railroad company was in the habit of loading its lumber cars so that the timbers would project beyond the car; this was proved to have been the common method of loading the lumber cars. One of its employees was injured while attempting to couple a car so loaded, being caught between the engine and a projecting piece of timber. The railroad company contended that because its cars were loaded in the usual manner, although negligently done, the employee assumed the risk of such negligence, and asked the court to instruct the jury as follows: "If the car of timber which hurt the plaintiff was loaded as loads of timber had been usually and commonly loaded and carried over defendant's and all other railroads, then it was not negligence in defendant to carry the timber upon which plaintiff was hurt." The instruction was refused, and, disposing of the assigned error, the court said: "The instruction was properly refused, for the obvious reason that habits of negligence on the part of defendant or other railroads, will not relieve them from the consequence of their negligent acts. It can hardly be insisted that, if one is 'usually and commonly' negligent, he will escape liability for his acts, and that the usual and common delinquencies of others will have the effect to excuse him. If, because an act is usual and common, it ceases to be negligent, it follows that the sure way of escaping liability for injuries to persons and property, in cases of this character, would be to adopt a certain and uniform system of common negligence." The above quotations so thoroughly discuss the propositions, and answer the contention of the appellant in this case, that it is unnecessary to give additional reasons in support of our answer.

To the third and fourth questions we reply: Turner was not a trespasser because he moved away from the place where he was at work to urinate. It is not shown that any convenient place was provided. It was the duty of the employees who were handling and switching the cars on the side track to use ordinary care to protect any person who might be lawfully upon the yards. Turner was an employee and lawfully at the place in returning to his work. There were no facts connected with the case which relieved the railroad employees of the duty to use ordinary care in handling the cars for the protection of such persons as might be in Turner's situation. They owed no special duty to Turner himself, but he was entitled to the protection due to any person who might be lawfully at that place.

To the fifth question we make the following answer: The evidence introduced raised the issue that the car which caused

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the injury was being propelled at a speed greater than six miles per hour. Spring, the only witness who saw Turner when he was struck, testified that when the car that was sent in on the side track struck the standing car the end of the latter car flew up off the track and came down with the trucks on the ties and, by the force of the blow, was driven 15 or 20 feet on the ties although the brakes were set on the flat car. Two witnesses who testified that they had long experience in these matters swore that such effect could not be produced except by a very great force, one of the witnesses saying that it would require a "terrific force." Other witnesses testified that no other car in that yard had ever been thrown from the track in such manner before. This evidence was amply sufficient to raise the question of excessive speed of the car.

To the seventh question we answer: The trial court did not err in refusing the charge referred to in the question. There was no evidence that Turner was in a place of safety when his foot slipped upon the loose dirt. His own declarations, which is the only evidence on the subject, was that he was then upon the railroad track and endeavoring to get off the track.

SHERMAN *et al.* v. TEXAS & N. O. R. Co.

(Supreme Court of Texas, March 15, 1906.)

[91 S. W. Rep. 561.]

Master and Servant—Fellow Servants—Who Are.*—A helper in a machine shop required to obey the foreman of the shop was directed by the foreman to aid an operator of a turning lathe in placing pieces of iron on the machine. The operator directed the helper what to do. Held, that the foreman, in sending the helper to the operator, put him under the direction of the operator, and they were not fellow servants under Rev. St. 1895, arts. 4560f, 4560g, defining vice principals and fellow servants, and the master was liable for the negligence of the operator to the same extent as if the foreman had given the directions.

Same—Injuries to Servant—Assumption of Risk.†—An experienced man in charge of a turning lathe instructed a servant 17 years of age to lift a piece of iron onto the machine. The servant had no knowledge of the work, and did not know that the iron was too heavy for him, and he was put to his election to obey or to be discharged. In lifting it he was injured. Held, that the servant did not assume the risk as a matter of law.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Enoch Sherman and another against the Texas & New Orleans Railroad Company. There was a judgment of the Court

*For the authorities in this series on the subject of the superior servant limitation of the fellow servant rule, see extensive note, 16 R. R. R. 146, 39 Am. & Eng. R. Cas., N. S., 146.

†See the preceding case and foot-notes.

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of Civil Appeals (87 S. W. 887), reversing a judgment for plaintiffs, and they bring error. Reversed.

Hutcheson, Campbell & Hutcheson, for plaintiffs in error.

Baker, Botts, Parker & Garwood, Andrews, Ball & Streetman, and *C. L. Carter*, for defendant in error.

BROWN, J. We extract the following statement from the opinion of the Court of Civil Appeals (87 S. W. 887):

"Enoch Sherman, for himself, and as next friend of George, his minor son, brought this suit against the railway company for damages for personal injuries alleged to have been sustained by the minor through the negligence of the company. The company answered by general denial and pleas of assumed risk and contributory negligence. A trial by jury resulted in a verdict and judgment in favor of plaintiff for himself and as next friend of the minor. The company has appealed.

"The following facts appear beyond dispute: Enoch Sherman was in the employ of the defendant as a helper in its machine shops. Thereafter, George Sherman, his son, was also employed in the same capacity. The father received \$1.60 per day and the son \$1.50 per day. The general duties of a helper were to fetch and carry for those operating the various machines in the shops, and to render prompt assistance whenever called on. The duties in which the minor was engaged up to the time of the accident were the handling and carrying of brasses and castings, of such weight as to be easily handled by one person. The minor was 17 years and 4 months of age at the date of the accident, was strong, healthy, and bright, and weighed between 150 and 160 pounds. He had been at work in the shops about three months, and, during that time, had been called on two or three times to aid in placing heavy pieces of iron on machines called turning lathes, but had always been assisted by others. On the occasion in question, an operative of one of the lathes called on the foreman to send him a helper to aid in placing a piece of iron upon his lathe. The foreman directed the minor to assist and he went at once to the lathe. The piece of iron was lying several feet from the machine, and before undertaking to lift it on to the table of the machine, the minor put a small piece of timber under its center, and by taking hold first of one end then the other brought it close to the side of the machine. The table of the machine on which the iron was to be placed was 28 inches high. When the iron had been thus brought close to the table the minor was directed by the operator to lift one end of the iron and place it on the table. This the minor did without injury to himself. The operator then placed an iron pin in the edge of the table so as to hold the end of the iron so it would not slip or fall off. He then told the minor to lift the other end on the table. This the minor did but claims that it was too heavy for him and that in lifting it he injured himself internally. According to the testimony adduced by plaintiff the consequences to the minor were serious. The railroad company knew that George Sherman

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was a minor. The minor says that when he lifted the iron to about the height of his knees he felt something give away inside of him. That when he felt this he stopped for a moment and then finished the lift and placed the iron on the table. He walked out of the shop at once, and has done no more work. The operator of the machine did not assist the minor in lifting either end of the iron. It was shown that for the placing of heavy irons on the lathe they had what was called a stirrup which was described as a hook placed in the side of the machine about half way between the floor and the top of the table. The heavy piece of iron would be raised at one end and rested in this hook and slid in one direction or another until its center rested in the hook when the iron would be lifted by hand first one end then the other and placed upon the table."

We do not concur in the conclusion of the honorable Court of Civil Appeals that the boy, George Sherman, and McCarthy, the man at the lathe, were fellow servants. The foreman of the shop testified of the duties of helpers as follows: "If they are called upon they must do that thing they are called upon to do immediately, that is understood with all the helpers, and if they don't do it they are discharged; if he don't do what he is told to do he is fired right there." In sending the boy, George, to the man at the lathe, the foreman put the minor under the "direction, control, and command" of McCarthy; hence they were not fellow servants under the provisions of articles 4560f and 4560g of the Revised Statutes of 1895. The railroad company is liable to the same extent as it would be if the foreman had been present and had given the orders and direction which McCarthy gave to the boy. *Wall v. T. & P. Ry. Co.*, 2 Posey, Unrep. Cas. 434; *Mann v. Oriental Print Works*, 11 R. I. 152; *Chicago & Ry. Co. v. Bayfield*, 37 Mich. 205; *Fransden v. Railway Co.*, 36 Iowa, 372. It cannot be said, as a matter of law, that the minor George Sherman could, by inspection of the piece of iron, tell whether it was too heavy for him to lift, and that he was capable of understanding the danger attending the lifting of the iron. Indeed, the only way that he could decide the question was to do as he did—obey the command of his superior, and make the attempt. But in that experiment, when he learned that the iron was too heavy for him to lift, the injury had been inflicted. The evidence of McCarthy, who was at the lathe, shows that in placing such irons upon the lathe the usual and proper manner was to use a stirrup to be affixed to the lathe upon which to rest the iron from which it would then be raised to the top of the lathe. The fact that the railroad company had provided the stirrup and inaugurated that method of handling iron when too heavy for one man to lift is strongly suggestive that the stirrup was a valuable aid in the performance of that duty, and we think that it does not conclusively appear that the stirrup would not have protected George Sherman if it had been used.

The case is distinguishable from *Haywood v. Railroad Com-*

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pany, 85 S. W. 433, 12 Tex. Ct. Rep. 295, in this: that Haywood was an experienced adult and actually knew of the danger of undertaking to carry the log as he was directed by the foreman. In this case an experienced man in charge of the work representing the master instructed a minor 17 years old, who had no knowledge of such work, to lift a piece of iron which was, in fact, of too great weight for the boy's strength. Under the testimony, this boy was put to his election, to obey the direction of McCarthy and lift the iron, or be discharged right there." The law does not require the servant, in doubtful matters, at his peril to disobey orders of the master. Of this, Judge Cooley said: It is true the master had no right to direct him to do any thing not contemplated in the employment, but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful; the giving of the orders being of itself an assumption that they are lawful; and the servant, who refuses to obey, would take upon himself the burden of showing a lawful reason for the refusal. This of itself is sufficient reason for excusing the servant, who declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith, and in the belief that it is rightful; and if, in his own judgment, it is unwarranted, is it not for the master to insist that the servant was in the wrong in not refusing obedience." *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 210.

The Court of Civil Appeals erred in rendering judgment for the railroad company; therefore, it is ordered that the judgment of the Court of Civil Appeals, in favor of the railroad company, be reversed, and that the cause be remanded to the district court for trial.

BALTIMORE & O. R. Co. *et al.* v. DECK.

(Court of Appeals of Maryland, Jan. 9, 1906.)

[62 Atl. Rep. 958.]

Witnesses—Cross-Examination.—Defendants, on cross-examination of plaintiff, may not ask whether he heard a certain witness give certain testimony on the former trial; he having, in his examination in chief, made no mention of such witness or the testimony on the former trial.

Appeal—Harmless Error.—Any error in refusing to allow a certain question on cross-examination is harmless; the witness having later testified fully on the subject.

Railroads—Injuries to Trespassers—Evidence.—Refusing to allow defendants, in an action against a railroad company and its servant for shooting plaintiff, to ask a witness how often he got messages that gentlemen had drawn pistols on and threatened trainmen, there being testimony that plaintiff and others who were stealing a ride on a freight train had so acted towards the trainmen, and that a message announcing it had been sent to the railroad authorities, is proper; it not appearing how the answer could be material or relevant.

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Same—Instructions—Evidence to Support.—Giving an instruction, in an action against a railroad company and its employee, who also held a commission as policeman from the state, for the shooting of plaintiff by such employee, stating the liability of defendants, if the jury found, among other things, that at the time the employee shot he was attempting to drive trespassers from the train, is erroneous; there being no evidence that he was making such attempt, but merely that he was in the act of arresting plaintiff and others, who were stealing a ride.

Evidence—Admissions.—Testimony that after plaintiff was shot, and while he was lying on the ground, defendant's employee, in the presence of plaintiff and another, said, "Yes, if I hadn't shot * * * [him] I would have kicked his ribs in," is evidence against defendant that the employee shot plaintiff.

Master and Servant—Act in Scope of Employment—Evidence.*—Whether one who was in the employ of a railroad company as a special officer, and had a commission as police officer from the state, was acting in the scope of his employment with the company when he shot plaintiff, who was stealing a ride on the company's freight train, held a question for the jury, under all the facts and circumstances.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Louis Deck against the Baltimore & Ohio Railroad Company and Charles A. Steiner. Judgment for plaintiff. Defendants appeal. Reversed.

Argued before McSherry, C. J., and Briscoe, Boyd, Page, Pearce, Schmucker, Jones, and Burke, JJ.

Duncan K. Brent, for appellants.

Gustavus A. Korb and *Myer Rosenbush*, for appellee.

BURKE, J. This case is before us for the second time. The first appeal is reported in 100 Md. 168, 59 Atl. 650. On that appeal the legal principles which should control the case were established, and we do not feel called upon to restate those principles in this opinion, or to reinforce them by reference to other authorities.

In order to prove the case stated in the declaration, the plaintiff, Louis Deck, testified: That about 12 o'clock on the night of July 1, 1899, he and several companions boarded a Baltimore & Ohio freight train, and rode as far as Oella, where they stayed until about 9 o'clock on the night of July 2, 1899, when they

*For the authorities in this series relating to the question involved in last head-note of the principal case, see foot-notes appended to *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479 (whether railroad companies are liable on account of arrests or prosecutions made or instigated by their employees or agents); foot-note appended to *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596.

For the authorities in this series on the question whether a railroad company is liable for the willful or malicious acts of its employees or agents, see foot-notes appended to *Willis v. Maysville & B. S. R. Co.* (Ky.), 16 R. R. R. 832, 39 Am. & Eng. R. Cas., N. S., 832; foot-note appended to *Davenport v. Charleston & W. C. Ry.* (S. Car.), 17 R. R. R. 222, 40 Am. & Eng. R. Cas., N. S., 222.

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boarded another freight train of the Baltimore & Ohio Railroad to return to Baltimore, but, when the train reached the point where the plaintiff was injured, it slowed down, and that he got off and started to walk. That he had walked a short distance when a shot was fired, and the ball struck him in the back. He afterwards heard other shots, but that the first shot he heard hit him. That, while he was lying on the ground, a man named Will Thomas came up with a lantern, and Steiner, one of the defendants, came also, and that Steiner asked what was the matter, and that the plaintiff told him he was shot. Thereupon Steiner said: "Yes; the son of a bitch, if I hadn't shot him, I would have kicked his ribs in." That he was about 15 feet from the train when he was shot. That, as soon as the ball hit him, he dropped right down. And one of the defendants, Charles Steiner, testified that he had been in the employ of the defendant company for about 20 years in various capacities; that he was on duty as a special officer for the defendant company on the night of July 2, 1899, and was paid by that company, and received no pay from any other source than from the Baltimore & Ohio Railroad; that his duties as special officer were to protect the company's cars and property, and drive off trespassers from trains, and arrest them, and keep them off the property; that on the night in question he was at the place of shooting as a policeman of the Baltimore & Ohio Railroad Company to protect its property, and in pursuance of his duty as policeman, commissioned by the state of Maryland for the preservation of law and order. And John J. Hoffman, one of Deck's companions on the night in question, testified that, when they got near the city limits, the train slowed up and Deck got off and said he was going home; that "before the train stopped altogether some one came up and told us to get off there, that we were under arrest, and we were about to get off, and some one fired a shot"; that witness turned in the opposite direction and ran; that he had no pistol, and, as far as he knew, his companions had none; that there was no necessity for firing a revolver, because whoever the man was he could have arrested us without firing a revolver. Herkenhahn, another of Deck's companions, testified that they boarded a freight train of the defendant company at Oelle on the night in question to return to Baltimore, and that, when the train got to Mt. Clare Junction, "some man ordered them off and said they were under arrest"; that, when the man ordered them off, he started to shoot at them, and they got off on the opposite side and ran; that he had no pistol and did no shooting. The plaintiff also proved by George J. Carlin that several months after the shooting Steiner told him that he had shot Deck, and by Dr. Smith he proved that Deck was seriously and permanently injured. The defendants offered evidence tending to prove: That on July 2, 1899, when the freight train of the Baltimore & Ohio Railroad Company, in charge of Conductor Severn, stopped at Frederick Junction, a station 58 miles from Baltimore, two men got off

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the train, Deck being one of them. That, as the train started to leave the station, the men got back on the train, and were ordered off by the conductor. That one of the men drew a pistol and held it in the face of the conductor, and said: "You son of a bitch, if you come up here, I will blow your brains out." That the men afterwards got off of the train. That the plaintiff was next seen at Bartholows, a station seven miles from Frederick Junction, and was then standing on the ground alongside of a freight train in charge of Conductor Willhide. That at Gaithersburg, a station 30 miles from Baltimore, a number of men were found standing on the bumpers of the cars, and were ordered off by Conductor Willhide. That the men told the conductor "to move on, or he would be filled full of lead," and one of the men pushed the witness Schroeder in the back with a pistol, and told him to move on. That Willhide sent a telegraphic message from Gaithersburg to the railroad authorities in Baltimore that tramps had taken charge of the train, and to send relief. That in response to this message Steiner and Higginbotham were sent to the scene of trouble. They met Willhide's train near Sextonville, and the account given by the defendants' witnesses as to the circumstances attending the shooting differ in many important particulars from that adduced in support of the plaintiff's case. The defendants' evidence tends to prove that, when the officers reached the train upon which the men were riding, Higginbotham went to the north side of the train and Steiner to the south; that Steiner attempted to put the men under arrest, and notified them that they were under arrest; that thereupon they pulled their pistols, jumped from the train to the ground, and began to shoot; that they fired a number of shots, and appeared to be shooting at Steiner; that, as soon as they ceased shooting, Higginbotham, who was four or five feet from the men, attempted to arrest them, when Deck jumped in front of him, and was shot in the back by one of the men in the crowd; that the shot which struck Deck was the last one fired; that after being shot Deck staggered across the west-bound track and fell; that immediately afterwards Steiner came over to where the plaintiff was lying, and asked Higginbotham if he "had got any of them"; that it was at this point that the alleged declaration of Steiner, mentioned in plaintiff's evidence, was made. There is an agreement in the record to the effect that the defendant Steiner was an employee of the Baltimore & Ohio Railroad Company on the night the plaintiff was shot, in the capacity of detective, or special officer; that he was on duty as such employee for said company on that night; and that, among other duties of said Steiner's employment, it was his duty to drive trespassers off the trains. These facts, which are the important and controlling ones in the record, are all that need be stated in order to enable us to pass upon the main questions presented upon this appeal.

During the trial four exceptions were taken by the defendants to the ruling of the court upon questions of evidence. We will

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first consider these exceptions. The defendants' counsel, on cross-examination, asked the plaintiff this question: "Did you hear him [Thomas] in that case, at that trial, he being your own witness, testify that Steiner had not said: 'If I hadn't shot the son of a bitch, I would have kicked his ribs in?'" The court refused to allow this question to be answered. This constitutes the defendants' first exception. The witness had made no mention of Thomas, or the testimony in the former trial in his examination in chief, and we see no reason why the defendants should have been permitted to cross-examine him as to what had been testified to by another witness in the former case. Thomas was present in court, and was afterwards called as a witness, both for the plaintiff and defendants, and testified to the facts sought to be elicited by the question to which the plaintiff's counsel had objected.

The defendants' second exception was abandoned. The defendants' third exception was taken to the refusal of the court to allow the counsel for defendants to ask the witness Steiner, on cross-examination, if he had not been called to the scene of the trouble, because of the notification of riotous and disorderly proceedings. If it be assumed that the trial court erred in this respect, it does not appear that the defendants were injured thereby, as the witness Steiner and others, at a later stage of the trial, testified fully as to the exact circumstances under which Steiner was called to the relief of Conductor Willhide.

The defendants' counsel proposed to ask the witness Andre the following question: "How often do you get messages announcing that gentlemen have drawn pistols upon and threatened trainmen?" The court refused to allow the question to be answered, and this constitutes the defendants' fourth exception. We are unable to see how the answer to this question could be material, or relevant to the issues involved. We therefore find no reversible errors in the rulings of the lower court upon questions of evidence.

The defendants' fifth exception presents for consideration the ruling of the court upon the prayers, and upon the special exceptions interposed by the defendants to the granting of the plaintiff's prayers. By the first prayer of the plaintiff, which was granted, the jury were instructed that if they find that the plaintiff was walking on or near the tracks of the defendant company on or about the night of July 2, 1899, as testified to, and if they further find that the defendant Steiner was in the employ of said defendant body corporate as a detective or special officer, and that while said Steiner was acting within the scope of his authority and in the course of his employment, if the jury so find, said Steiner attempted or was in the act of driving trespassers from a train belonging to the defendant body corporate, said Steiner recklessly and wantonly fired a pistol toward the plaintiff, then their verdict must be for the plaintiff. To the granting of this prayer two special exceptions were filed—one by the de-

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fendants jointly, and one by the Baltimore & Ohio Railroad Company—both of which were overruled. The first exception asserted that there had been no evidence offered legally sufficient to show either that Steiner attempted or was in the act of driving off trespassers from a train belonging to the defendant body corporate, or that said Steiner recklessly or wantonly fired a pistol towards the plaintiff. The other exception is to both prayers of the plaintiff, and asserts that “there is no evidence in the case legally sufficient to show, as against the Baltimore & Ohio Railroad Company, that the shot by which Deck was hurt was fired by defendant Steiner.”

We are not able to find in this record any evidence to support the hypothesis that on the occasion when the plaintiff was injured Steiner attempted or was in the act of driving trespassers from a train of the defendant company. In this respect the case is widely different from the one presented on the former appeal of *Deck v. Baltimore & Ohio Railroad Company*. In that case the defendants showed that Steiner was simply driving trespassers from the train. In this case it appears by every witness, both for the plaintiff and for the defendants, who has spoken upon the subject, that Steiner was in the act of arresting the men on the train for a breach of the criminal law of the state at the time the plaintiff was injured. By the plaintiff's own evidence it appears that he and his companions were guilty of a criminal act, and, if the testimony of the defendants' witnesses be true, they were a band of reckless and desperate lawbreakers. Steiner was a state officer, appointed by the governor under the law, and held a commission from the state. He was also an employee of the defendant company, but whether he was acting as an employee of the company at the time the injury was inflicted, or as a commissioned officer of the state in the exercise of the powers of his office in attempting to arrest, without warrant, the men on the train, who were confessedly violators of the criminal law of the state, were questions which should have been submitted to the decisions of the jury. From what we have said it is manifest that the prayer clearly misstated the real act and purpose of Steiner, as shown by the evidence. The legal consequence which would follow from his acts done solely in one capacity would be quite different from that which would result from acts done in the other. We are, therefore, of opinion that the court committed an error in granting the plaintiff's first prayer, because there was no evidence in the case legally sufficient to support the hypothesis that Steiner, at the time the injury was inflicted, was attempting or was in the act of driving off trespassers from the defendant company's train.

We find no error in granting the plaintiff's second prayer. It is one that has been repeatedly approved by this court, and under the facts, as declared by the record, is free from objection.

The first prayer of the Baltimore & Ohio Railroad Company was properly refused. The admissibility of the alleged declaration of Steiner, stated in the prayer, to bind the railroad com-

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pany, was considered and passed upon by this court on the former appeal. The court, in considering the prayer of the railroad company, granted by the court below at the conclusion of the plaintiff's case, by which the jury was directed to find their verdict for the defendant company, Fowler, J., in delivering the opinion in that case, propounds this question: "Was there any evidence in the case legally sufficient to prove that the defendant Steiner did the shooting complained of?" He was then inquiring whether or not there was any evidence legally sufficient to be submitted to the jury to show, as against the Baltimore & Ohio Railroad Company, that Steiner did the shooting. In answer to that question the court distinctly decided that the evidence of the plaintiff that Steiner said, in the presence of Thomas, after the plaintiff was shot, and while he was lying upon the ground: "Yes; if I hadn't shot the son of a bitch, I would have kicked his ribs in"—was evidence to be considered by the jury against the defendant company that Steiner had shot the plaintiff.

There was no error in refusing the defendants' third prayer, because the question whether Steiner was acting in the scope of his employment as an employee of the Baltimore & Ohio Railroad Company at the time the plaintiff was shot was a question for the jury to pass upon, under all the facts and circumstances of the case.

For error in granting the plaintiff's first prayer, the judgment must be reversed.

Judgment reversed, and new trial awarded, with costs to the appellants.

GORDON *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, Feb. 16, 1906.)

[106 N. W. Rep. 177.]

Pleading—Amendment of Complaint—Statement of New Cause of Action.—Where, in an action for injuries to a brakeman, the petition alleged that the accident was caused by the condition of the track, in that the road was negligently constructed so that there was a sharp depression in the track, an amendment of the petition alleging that defendant had negligently permitted the track to become out of repair, rough, and uneven did not state a new cause of action.

Limitation of Actions—Commencement of Action—Amendment of Petition.—Where an amendment to a petition does not state a new cause of action, but merely amplifies the allegations of the original pleading, or states new grounds or specifications germane to such allegations, the amendment will be upheld, though the period of limitations has intervened.

Master and Servant—Injuries to Servant—Negligence of Master and Fellow Servant.*—A servant may recover of the master for injuries owing to his negligence co-operating with that of a fellow servant.

*See foot-notes appended to *Fuller v. Tremont Lumber Co.* (La.), 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710; *Cole v. St. Louis Transit Co.* (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; foot-note appended to *Gila Valley, etc., Ry. Co. v. Lyon* (Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745; *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795.

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Same—Operation of Railroads—Questions for Jury—Proper Construction of Road.—In an action for injuries to a brakeman, owing to the alleged negligence of defendant in the manner in which it constructed its road, the jury may inquire into the construction of the road, though the question involves questions of engineering, etc.

Same—Petition—Sufficiency.—In an action for injuries to a brakeman, a petition alleging that, by reason of defendant's failure to exercise due care in the construction of its road and in the furnishing of proper couplings, the train became uncoupled and the sections collided, resulting in the injury complained of, was not objectionable on the ground that it did not show the negligence of defendant to have been the proximate cause of the injury.

Pleading—Immaterial Allegations.—The fact that a pleading, in addition to necessary and proper averments, alleging immaterial and redundant matter, does not render it demurrable.

Appeal from District Court, Polk County; C. P. Holmes, Judge.

Action at law to recover damages for a personal injury. Judgment for defendant upon demurrer to petition. Plaintiff appeals. Reversed.

Wm. G. Clark, for appellant.

Carroll Wright, for appellee.

WEAVER, J. The appellant was a brakeman in defendant's service, and at the time of his injury was employed upon a freight train operated over the defendant's road in Indian Territory. On the 20th of January, 1898, as the train was nearing the station at the town of Minco, the coupling between two of the cars accidentally separated without attracting the attention of the trainmen, and the forward section of the train moved on to the station, where a stop was made for water. While appellant, who had been riding on the engine, was assisting in drawing the water, the rear section of the train, moving down the grade, collided with the standing cars. In this collision appellant's leg was crushed, necessitating amputation. This action for damages on account of such injury was begun April 19, 1899. The original petition, with some amendments thereto, having been superseded, need not be more particularly referred to. On November 13, 1899, a substituted pleading was filed, alleging that appellant's said injury was caused by defendant's negligence. The charge of negligence was in a single count, but was based principally on two grounds, as follows: (1) That the defendant's road was negligently constructed, in that a sharp depression was made in the track so that freight trains passing over it were liable to become uncoupled, and that the danger thus created was greatly increased by operating such trains at that point at a high rate of speed, of all which defendant had notice; and (2) that frequent inspection of a freight train, and vigilance in keeping lookout to prevent accident and injury from the uncoupling of cars moving over a road so constructed, were necessary to maintain such train in condition to afford a reasonably safe place to work, and although, by defendant's rules, the conductor and

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engineer were required to see that this duty was performed, they negligently failed so to do. This pleading was followed, October 19, 1900, by another substitute, restating in substance the two grounds of negligence aforesaid, and further alleging that defendant negligently failed to provide or enforce rules limiting the speed of trains as was reasonably necessary at the place in question, and negligently equipped its train with a coupler so defectively made and devised as to be liable to become uncoupled when the train was passing over changes of grade in the roadbed. To parts of this petition defendant demurred as follows: (1) To the allegation of negligence on part of conductor, engineer, and trainmen, because such persons were the fellow servants of appellant, and defendant is not liable to him for injuries so received. (2) To the allegation as to a depression in the track, because the question whether the road should have been built on a different grade cannot be inquired into in this action, and it does not appear that such depression was the proximate cause of plaintiff's injury, nor does it appear that defendant or its employees had any knowledge that the train separated at said depression in the track. (3) To the allegation as to a defective device for coupling and the allegation as to failure to provide a rule or regulation limiting the rate of train speed, because, in each instance, it appears from the petition that such alleged negligence was not the proximate cause of plaintiff's injury. Before the demurrer was ruled upon plaintiff filed an amendment to his substituted petition, alleging that defendant had negligently permitted its track at the place in question to become out of repair, rough, and uneven, with sudden and great inequalities; thus causing the uncoupling of the train on which plaintiff was employed. This amendment was also demurred to by defendant on the ground that it sets up a new and distinct ground of alleged negligence, and that plaintiff's right of action upon such ground is barred by the statute of limitations. The demurrers to the petition and to the amendment were each sustained; and, plaintiff declining further to amend and electing to stand on his pleadings as made, judgment was entered in favor of defendant for costs.

1. As we hold, for reasons hereinafter stated, that the amended and substituted petition states a good cause of action irrespective of the amendment, it is unnecessary for us to dwell particularly upon the question raised by the demurrer to the latter. It is conceded that, if an amendment made to a petition states a new and independent cause of action, it is to be treated as the commencement of a new suit, and, if the period of limitation upon such causes of action has intervened, the amendment is demurrable. *Box v. Railroad Co.*, 107 Iowa, 660, 78 N. W. 694. If, however, the new matter pleaded does not state a new cause of action, but merely amplifies the charge made in the prior pleading, or states new grounds or specifications germane to such charges or allegations, the amendment may be upheld without regard to the statute of limitations. *Kuhns v. Railroad Co.*, 76 Iowa, 67, 40 N. W.

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92; *Cobb v. Railroad Co.*, 38 Iowa, 627; *Williamson v. Railroad Co.*, 84 Iowa, 583, 51 N. W. 60; *Van Patten v. Waugh*, 122 Iowa, 302, 98 N. W. 119; *Thayer v. Coal Co.* (decided at the present term of court) 105 N. W. 1024. The propriety and soundness of the rule is self-evident, and the only trouble to be found respecting it is in determining with accuracy in all cases whether a given amendment does, in fact, present a new cause of action, or is, at most, an amplification of the original pleading. In most cases the distinction is too apparent to cause hesitation in the mind of the court or lawyer, but others are of the border line class, and it is not always easy to distinguish between cases which the courts have placed on opposite sides of the line. For instance, the writer finds much difficulty in reconciling the application made of the rule to the facts in the *Box Case* with the application made in the *Kuhn Case*, but there is no inconsistency in the propositions of law affirmed in the two opinions. On the contrary, the court in the later case distinctly recognizes and accepts the former as authoritative, but finds that the new averments in the amendment then under consideration amounted to the statement of another cause of action. Various tests to determine whether the matter averred in an amendment does constitute a new cause of action have been suggested in the opinions hereinbefore cited, and to these we may add another, which suggests itself to us as one by which the true nature of the allegation may generally be developed. Our statute provides (Code, § 3559) that, where a petition includes more than one cause of action, each shall be stated in a separate count, which shall be complete in itself, and it is a matter of every day practice to require a pleader who fails to observe this provision and combines two or more causes in a single count to amend and state them separately. Now, if the plaintiff in the instant case in his original petition had alleged in a single count that the railway track was in an unsafe and dangerous condition by reason of a sharp depression or excessive unevenness or roughness therein, and that such condition was the result of the negligence of the defendant in the construction of the road and in failing to keep the same in repair, we think no one would contend that such an allegation would be objectionable as embracing two causes of action in one statement, and no court would sustain a motion to require the allegations as to negligence in construction and negligence in failure to repair to be stated in separate counts. Negligence in itself constitutes no cause of action. The cause of action which the present plaintiff asserts is an alleged personal injury, occasioned, as he claims, by a defective condition in defendant's railway track, which condition was produced or brought about by the defendant's negligence. Statement of the specific acts or facts constituting the alleged negligence by which injury has been occasioned is never necessary to the statement of a cause of action. *Grinde v. Railroad Co.*, 42 Iowa, 376; *Scott v. Hogan*, 72 Iowa, 614, 34 N. W. 444; 14 Encyc. Pl. & Pr. 333. In other words, a petition which

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charges that an act was negligently done, to the plaintiff's injury, is not demurrable, but, as a matter of justice to the defendant, that he may be able to anticipate the nature of the evidence, he will be required to meet and to properly prepare his defense, the practice now prevails, at least in many cases, to require the plaintiff, upon motion of the defendant, to specify with reasonable precision the facts which he expects to prove in support of the ultimate alleged fact of negligence. This is, in a sense, as said by us in the Grinde Case, a pleading of the evidence rather than of the ultimate issuable facts, but is permissible in the interest of directness and certainty. If, therefore, the plaintiff had in this case alleged that defendant had negligently permitted a certain dangerous defect to be and remain in its roadbed, whereby plaintiff, without fault on his part, had been injured, he would have stated all that was necessary to constitute a cause of action. He was not required, save in response to a demand for more specific statement, to allege whether the defect was one in the construction of the road or in failing to repair, and if, on a motion to that effect, he had amended his pleading, specifying negligence in construction and negligence in maintenance, it could not be said to be the statement of another cause of action. See 6 Thompson's Negligence, § 7467. If this be true, and we see no way to avoid the conclusion, then the amendment to which the demurrer was sustained was not vulnerable to the objection that it stated a new cause of action, and its effect was only to make a more specific statement of the facts which he proposed to prove in support of the charge originally made.

2. The place of appellant's injury being in the Indian Territory, it is conceded that, under the rule of law there prevailing, the conductor and engineer of the train were not, by virtue of their superior position or superior authority, vice principals of the defendant, and that for injuries resulting to appellant from their negligence alone defendant would not be liable. If, therefore, the amended and substituted petition is to be construed as basing appellant's right of recovery solely upon the alleged negligence of the conductor and engineer, then the demurrer was properly sustained. But such does not seem to be the position assumed by the appellant. He goes farther, and pleads negligence of the employer in the equipment of the train with a defective coupling device, also in the construction and maintenance of the road, and in failing to adopt and enforce reasonable rules and regulations limiting the speed of its freight trains over the road so defectively constructed. Taking all these allegations together, the pleading in legal effect charges negligence of the master in relation to duties which cannot be avoided by delegation to another, and avers that such negligence, combined with the negligence of certain fellow servants, was the efficient cause of the accident in which plaintiff received his injury. That a right of recovery exists in favor of a servant against the master whose negligence combines or co-operates with the negligence of

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a fellow servant, to his injury, is too well established for controversy. *Grand Trunk Ry. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Fisk v. Railroad*, 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; *Hunn v. Railroad*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Stetler v. Railroad*, 46 Wis. 497, 1 N. W. 112; *Ellis v. Railroad*, 95 N. Y. 546; *Pullman v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Smith v. Railroad (C. C.)* 18 Fed. 304; *Elmer v. Locke*, 135 Mass. 575. It follows that the allegation was not demurrable as failing to state a cause of action.

3. The petition, as we have seen, alleged in substance that defendant's road was negligently constructed and maintained with a sharp depression in the track near the town of Minco, and that freight trains in passing over this depression, especially when moving at a high rate of speed, were liable to become uncoupled. It is further alleged that the train was equipped with a coupling so defectively made and devised as to be liable to become separated in descending to the foot of a steep grade, and that by reason of such negligence, combined with the speed of the train and the failure of the defendant to make and enforce rules for regulation of such speed, plaintiff's train became uncoupled in passing over the defective track, resulting in the collision and injury of which mention has been made. Assuming the truth of these statements, as we must, in considering this demurrer, we think they reveal a good cause of action. We cannot give our assent to the proposition advanced by appellee, that in actions of this nature the construction of the road cannot be questioned, or that "it will not do to allow juries to inquire into questions of this character." The only authority cited in support of the point thus made is *Tuttle v. Railroad*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114. In that case the majority opinion contains a few sentences which, standing alone, would appear to be in harmony with appellee's view of the law, but a reading of the entire opinion discloses that the employee who was there seeking a recovery of damages had entered into and remained in the company's service with full knowledge of the defective track on and about which he worked, and was therefore held to have assumed the risk of injury therefrom. Such being the case, the language quoted by appellee herein may be considered dictum. Moreover, the defect there complained of was in the construction of a side track, and according to many authorities railroad companies are not held to the same degree of care in respect to such tracks as they are in respect to main tracks. *O'Donnell v. Railroad*, 89 Mich. 174, 50 N. W. 801. Certain it is, the courts with practical unanimity hold that railroad companies constitute no exception to the general rule which requires the employer to furnish his employee a reasonably safe place to work, and that the application of such rule extends to the roadbed and safety of the track over which trainmen are required to operate their trains. If inquiry into the construction of the road cannot be made by a jury

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because it may involve questions of engineering or mechanics or scientific or expert discussion, then, for equally good reason, can inquiry into the reasonable safety of the place of work be suppressed in substantially every action brought by servant against master. *Smith v. Railroad* (C. C.) 18 Fed. 304; *Penn. Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27; *Pahlan v. Railroad*, 122 Mich. 232, 81 N. W. 103; *Lake Erie Railroad v. Morrissey*, 177 Ill. 376, 52 N. E. 299; *Stoher v. Railroad* (Mo. Sup.) 4 S. W. 389; *St. Louis Railroad v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *Chicago, etc., Railroad v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Houston, etc., Railroad v. Oram*, 49 Tex. 341; *C. M. R. R. v. Naylor*, 17 Colo. 501, 30 Pac. 249, 31 Am. St. Rep. 335; *Meloy v. Railroad*, 77 Iowa, 746, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325; *Bryce v. Railroad*, 103 Iowa, 665, 72 N. W. 780; *Chicago, etc., R. v. Eaton* (Ill.) 62 N. E. 784; *C. G. & W. R. v. Price*, 97 Fed. 423, 38 C. C. A. 239; *Patton v. Railroad*, 82 Fed. 979, 27 C. C. A. 287; *Paulmier v. Railroad*, 34 N. J. Law, 151; *Elmer v. Locke*, 135 Mass. 575; *U. P. Ry. v. O'Brien*, 49 Fed. 538, 1 C. C. A. 354, 4 U. S. App. 221, affirmed on appeal, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *St. Louis Br. Co. v. Fellows*, 52 Ill. App. 504.

The further point made in the demurrer, that the petition fails to show that the alleged negligence of the defendant was the proximate cause of appellant's injury, and that it shows such alleged negligence was not the proximate cause of the injury, is not well taken. It is averred, as we have already noted, that by reason of defendant's failure to exercise due care in the matters pleaded the train became uncoupled, and the separated sections were brought into collision, resulting in appellant's injury. In these averments we find the alleged cause and the alleged effect, and their sequence is not so clearly impossible or unnatural that we can say they do not present a cause of action.

4. It may be remarked that the demurrer is objectionable, in that each ground thereof is directed against some distinct allegation or statement in the petition, and not against the entire pleading. In other words, the demurrer is not to the petition, but it is expressly directed in each instance "to so much of said petition as alleges" certain matters therein referred to. As the petition contains but a single count, it must, upon demurrer, be held good or bad as an entirety. If, when read as a whole, it contains enough to constitute a cause of action, a demurrer thereto must be overruled without regard to the redundant or immaterial matter which may be pleaded therein. In *Hayden v. Anderson*, 17 Iowa, 158, a demurrer identical in form with the one now under consideration was held not to challenge the sufficiency of the pleading to which it was directed, a ruling which has been reaffirmed in later cases. *Delaware Bank v. Duncombe*, 48 Iowa, 488; *C. I. & D. R. R. v. Railroad*, 67 Iowa, 324, 25 N. W. 264; *Shulte v. Hennessy*, 40 Iowa, 352; *In re McMurray's Estate*, 107 Iowa, 648, 78 N. W. 691. So, too, it is held that a demurrer to

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an entire pleading should not be sustained because, in addition to necessary and proper averments, it alleges other matters which do not constitute a cause of action or ground of defense. *Dist. Twp. v. Dist. Twp.*, 44 Iowa, 512; *Bonney v. Bonney*, 29 Iowa, 448; *Holbert v. Railroad*, 38 Iowa, 315.

We have preferred, however, not to dispose of the appeal on this rule of pleading alone, because, in view of a possible trial of the case upon its merits, it has seemed desirable to discuss some of the leading legal propositions argued by counsel. Our conclusion that the petition states a cause of action makes it necessary to remand the cause to the trial court for further proceedings not inconsistent with the views herein expressed.

The judgment appealed from is therefore reversed.

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(Supreme Court of Missouri, Jan. 24, 1906.)

[91 S. W. Rep. 949.]

False Imprisonment—Liability of Principal—Authority of Agent.*—

Where, after one of defendant's railroad trains had been held up, defendant's general superintendent directed the president of a corporation engaged in the detective business to find out who committed the robbery and report, defendant was not liable for false imprisonment resulting from an arrest of plaintiff participated in by one of the employees of the detective agency; such arrest not being within the scope of the authority conferred on the detective agency.

Valliant, J., dissenting.

In Banc. Appeal from Circuit Court, Clay County; E. J. Broaddus, Judge.

Action by Harry E. Milton against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Elijah Robinson, for appellant.

Frank P. Walsh, *Wm. H. Wallace*, and *T. B. Wallace*, for respondent.

MARSHALL, J. This is an action for false imprisonment. The plaintiff recovered a judgment for \$10,000 in the circuit court of Clay county, and the defendant appealed.

The petition alleges that on the 4th of October, 1898, the defendant, acting through its agents and servants, and through certain detectives and officers from Missouri and Kansas, did, without any warrant or other legal process, and without probable cause, falsely, wantonly, maliciously, illegally, and unlawfully

*For the authorities in this series on the question whether a railroad company is liable for the arrests or prosecutions made or instigated by its servants or agents, see foot-note appended to *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596.

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imprison plaintiff in a certain jail in the western part of Kansas City, Mo., did keep him there for about four days and nights, and denied him access to his relatives and friends and the benefit of counsel, for which the plaintiff claimed \$15,000 compensatory damages and \$15,000 punitive damages. The answer is a general denial.

The case-made is this: On the 23d of September, 1898, one of the defendant's passenger trains was held up and robbed near Leeds, in the southern part of Kansas City. A day or two afterwards H. G. Clark, the defendant's general superintendent, sent for Thomas Furlong, the president of the Furlong Secret Service Company, a corporation engaged in the detective business, and when Furlong arrived Clark said to him: "I suppose you have read and heard about this train robbery up near Kansas City?" He said: "Yes, sir." Clark then said: "I want you to go up there and find out who committed this robbery, and report." Furlong states the matter in this way: "Mr. Clark said a train had been held up at Leeds the night before, and that he wished that I would go up there and ascertain the facts pertaining to the robbery, if I could, as to who the parties were that held up the train." The foregoing is all the evidence in the case as to the employment of Furlong by the defendant, and that evidence was adduced by the plaintiff. Accordingly Furlong went to Kansas City, and also had two of his employees, Dickson and Harbaugh, to go there also. Prior to Furlong's reaching Kansas City, John Hays, the chief of the police department at that city, with his detective force, had been investigating the matter, and had obtained information that convinced them that one Lowe was implicated therein, but they had been unable to locate him. After Harbaugh's arrival, he succeeded in finding him, and he was arrested by the police department of Kansas City, and Lowe confessed to having been interested in the hold-up, and stated the names of other persons who acted with him, and said that one of the parties told him that his friend Harry (no surname is disclosed, and Lowe disclaimed knowledge of the same) would get the buggy in which they would ride to the place where the hold-up was to occur. Furlong instructed Harbaugh to ascertain any facts and any information that he could that would lead to the discovery of the robbers, and to act in connection with Chief Hays, and to report to Chief Hays, and Chief Hays detailed Harbaugh to work with three of the Kansas City detectives, Sanderson, Bryant, and Keshlear, on the matter. Thereafter Harbaugh continued so to operate with the local detectives. There were other detectives representing the express company also working on the case. Furlong did not remain long in Kansas City. From information obtained by Hays, he concluded that the plaintiff was the person referred to as Harry, and accordingly reported to Mastin, the prosecuting attorney of the county, and he advised him to send over to Kansas City, Kan., where the plaintiff was working as a switchman in the yards of the Chicago & Great

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Western Railway Company, and ask him to come over to Kansas City, Mo., and, if he refused, to ask for the assistance of the police department of Kansas City, Kan., and have him (the plaintiff) locked up over there, and to send the persons who claimed to be able to identify "Harry" to see him. Accordingly Harbaugh, Bryant, Keshlear, and Sanderson went over to the said yards, and Sanderson, with the assistance of one Addison, who was connected with the police department of Kansas City, Kan., arrested the plaintiff, and Sanderson took him to the Mulberry Street Police Station in Kansas City. Harbaugh, Sanderson, and Addison testified that Harbaugh had nothing to do with the arrest or subsequent confinement, while, on the other hand, other witnesses, who were present, testified that Harbaugh participated in the arrest. After Sanderson had taken the plaintiff to Kansas City, Mo., Harbaugh and Addison went to the house of the plaintiff's sister, Mrs. Hodgkins, and without her consent, searched the room in the house where the plaintiff had been staying, and took a hat, a necktie, and a collar, being the property of the plaintiff, after she had refused to sell them to them for \$5, and told her the plaintiff would not be home that night for they had him at the police station where they wanted him. Furlong testified that his company had no authority to make arrests and no police power, and that he gave Harbaugh no instructions as to participating in the arrest of any person in this particular case, but that Harbaugh had general instructions not to participate in arrests. While the plaintiff was in prison he was compelled to put on the hat, necktie, and collar, aforesaid, and to submit to the inspection of various persons to see whether he could be identified as the "Harry" who got the buggy for the robbers. During those inspections Harbaugh was present and participated therein. None of the persons who had called to identify him were able to say that he was the "Harry" referred to. So, after being held under arrest for four days and nights, the plaintiff was discharged and went back to work with the railroad aforesaid.

At the close of the whole case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted, and now assigns that ruling of the court as the chief error relied on.

The chief contention of the defendant is that the plaintiff failed to make out a prima facie case. The gist of the contention is that the employment of Furlong by the defendant's general superintendent conferred no authority upon Furlong or any of his agents to arrest the plaintiff or to participate in any such arrest, nor was such an arrest within the scope of the employment of Furlong. Reduced to its last analysis, this case must be solved upon the determination of the proposition whether authority conferred by a principal upon an agent to ascertain certain facts and to report to the principal makes the principal liable for the act of the agent in arresting a third person for the purpose of ascertaining whether he was concerned in the robbery under investiga-

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tion. There is very little difference between counsel as to the general rules of law bearing upon the question under consideration.

The plaintiff cites a great number of cases, but relies principally upon *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405. In that case the defendant kept a gun store and had a clerk to assist him in selling firearms and ammunition. He had instructed the clerk never to load a gun. A customer went to the store to buy a gun and the clerk showed him a Henry rifle. The customer requested the clerk to load it so that he could see how it worked. The clerk at first refused, stating that it was against orders to load firearms in the store. The customer refused to buy unless he could see how it was loaded. Thereupon the clerk undertook to load the gun. It was discharged, and the plaintiff, who was sitting at a window on the opposite side of the street, was shot. This court, per Wagner, J., stated the general rule of law as follows: "The universally recognized rule is that the principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for an act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out. In determining whether the particular act is done in the course of a servant's employment, it is proper, first, to inquire whether the servant was, at the time, engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relation to his master. *Shearman & R. Negli*. § 63, and notes. It may not perhaps be very easy to reconcile the numerous cases on this subject, but we think that the correct rule extracted and deduced from them will be found as above laid down." In the same case it was further said: "The true ground upon which a master avoids responsibility for most of the willful acts of his servant when unauthorized by him is that they were not done in the course of the servant's employment. When they are so done, the master is liable for them."

In 1 Am. & Eng. Enc. of Law (2d Ed.) p. 1151, the rule is thus stated: "It is a general rule that the principal will be liable where the torts of an agent are done by his express authority, or are the natural consequence resulting from an order given, or where they are committed in the course of the agent's employment, although the principal did not authorize, or justify, or participate in, or even if he disapprove of them. But the principal will not be liable for torts committed by the agent outside the scope of

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the authority delegated to him." The same author, at page 1156, says: "The earlier cases, both in this country and in England, support the doctrine that the principal cannot be held liable for the wanton or malicious act of the agent. The later decisions, however, incline to the rule making the principal liable for acts of the agent done within the scope of his employment, though they be wanton or malicious, and relieving him from responsibility when the agent steps aside from the business of his principal and wantonly or maliciously commits an act to accomplish an individual purpose of his own."

Stringer v. Railroad, 96 Mo. 299, 9 S. W. 905, was an action for damages for personal injury. On the invitation of a brakeman, the plaintiff boarded one of defendant's engines in the city of St. Louis to ride to another point in the city. The engine jumped the track, and the plaintiff was injured. It was held that the defendant was not liable, and *Snyder v. Railroad*, 60 Mo. 419, was cited as authority for the proposition that: "The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment." And *Shearman v. Railroad*, 72 Mo. 63, 37 Am. Rep. 423, and *Cousins v. Railroad*, 66 Mo. 576, were said to hold the same doctrine.

Farber v. Railroad, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, was an action for damages for personal injuries. The plaintiff and his friend boarded one of defendant's freight trains in St. Louis to steal a ride to Kirkwood. Before reaching their destination a brakeman observed them and ejected them from the train, while it was in motion, in consequence of which the plaintiff was injured. This court, per Gantt, J., said: "It was said in *Snyder v. Railroad*, 60 Mo. 413, that: 'It is firmly established in this state that the master is civilly liable for a tortious act of his servant, whether of omission or commission, and whether negligent, fraudulent, or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved or forbidden them.' *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405. Indeed the doctrine of the old cases, as announced in *McManus v. Crickett*, 1 East's Term Reports, 106, no longer obtains in the courts in this state. The liability of the master for the acts of a servant rests now upon the condition whether or not the act of the servant was in the course of his employment. *Perkins v. Railroad*, 55 Mo. 201; *Craker v. Railroad*, 36 Wis. 657, 17 Am. Rep. 504."

Counsel have cited many cases illustrative of the liability of a principal for the tortious acts of an agent, and with few exceptions they all proceed, or attempt to proceed, on the rule hereinbefore referred to. There is not much difficulty in determining

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the law applicable to such cases, but the trouble always arises from the application of the law to the particular facts in judgment in each case. The crucial test in all cases is whether the act of the agent was within the scope of his employment. For instance, the employment of an agent to present a claim, and demand payment thereof from a debtor to his principal, does not include within its scope the right to arrest or assault the debtor if he refuses to pay. Such an employment contemplates only lawful and peaceable acts, and, when an agent so clothed with authority commits a trespass upon the debtor, he acts wholly outside of the scope of his employment. The employment of a mercantile agency by a creditor to ascertain and report the financial condition of a debtor does not contemplate, within its scope, the arrest of the debtor by the mercantile agency, even to force him to disclose his true financial condition. In short, the employment of one to ascertain a fact and to report the result thereof does not contemplate within its scope the right to arrest or commit any trespass upon any person whomsoever.

The case at bar is totally different from cases wherein the agent was charged with the duty of keeping and preserving the property of a principal, and, in the attempt so to do, caused the arrest of a third person who undertook to interfere or make way with the principal's property. In the case at bar a grievous wrong was clearly done to the plaintiff, but the defendant is not liable therefor, unless it could be held that the employment of the detective to ascertain the facts as to who was concerned in the hold-up and robbery of its train contemplated within its scope the right or duty of the detective to cause the arrest of any one whom the detective might suspect had been concerned therein. The employment by the defendant of Furlong was to ascertain the facts as to the robbery and to report the result to the defendant's general superintendent. The fact that Furlong was engaged in the detective business does not alter the defendant's liability in the least. The defendant's liability would be the same whether it had sent one of its own employees to make such investigation and report. The fact, if it be a fact, that detectives unlawfully arrest persons for the purpose of extorting confessions from them, or of subjecting them to scrutiny by other persons for the purpose of identification, cannot alter the rules of law applicable to the liability of a principal for the acts of his servant, unless the principal knew that the detective employed was in the habit of employing such methods, and there is no evidence that such was the case in this instance.

The full extent and scope of Furlong's employment by defendant was to ascertain and report the facts, not to arrest any one or to commit any tortious acts whatever. The defendant would be liable for all of the acts done by Furlong or his agents within the scope and purpose of the employment, whether the same be tortious or otherwise; but the defendant is not liable for any act of Furlong or his agents that did not fall within the scope of such

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employment. For the purpose of this case it may be conceded that Harbaugh made the arrest complained of, although there is scarcely room for doubt that the arrest was made by the direction of the chief of police of Kansas City on the advice of the prosecuting attorney of Jackson county, and not at the instance of either the defendant or Harbaugh, although Harbough was present and may have aided or abetted therein, yet as Harbaugh had no authority from any one so to do, and as the business of the defendant, which Furlong was employed to conduct, did not include within its scope the arrest of any one, the defendant cannot be held liable for the act of Harbaugh in the premises.

This conclusion makes it unnecessary to consider the other points relied on by the defendant, and necessarily results in holding that the trial court erred in overruling the demurrer to the evidence.

As no good purpose can be subserved by a new trial herein, the judgment of the circuit court is reversed, without remanding the case.

BRACE, C. J., and GANTT, BURGESS, FOX, and LAMM, JJ., concur.

PENNSYLVANIA CO. v. CHAPMAN.

(Supreme Court of Illinois, Dec. 20, 1905. Rehearing Denied April 5, 1906.)

[77 N. E. Rep. 248.]

Master and Servant—Injuries to Servant—Pleading—General Issue—Effect.—In an action against a railroad for injuries to a switchman, a plea of the general issue is an admission that at the time of the alleged injury the railroad was operating the particular line of road mentioned in the declaration and that the persons in charge of the trains were its servants.

Same—Question for Jury.—In an action against a railroad for injuries to a switchman, the question whether the railroad was operating a particular line of railroad at the time of the injury as alleged in the declaration is, where the evidence is conflicting, one for the jury.

Same—Relief Fund Agreements—Validity.*—An agreement by a railroad employee that he will accept benefits from a relief fund in discharge of any claim which might accrue to him for damages for personal injuries is valid.

Same—Construction of Agreement.—An agreement by a railroad employee to accept the benefits of a relief fund in discharge of any claim which might accrue to him against the railroad for damages for personal injuries must be construed in connection with the by-laws of the relief department which maintains the relief fund.

Same—Violation of Release—Effect.—Where a railroad fails to comply with its relief-fund agreement with an injured employee, the latter may sue for damages for his injury, and the railroad, while entitled

*See foot-notes appended to Chicago, etc., R. Co. v. Olson (Neb.), 10 R. R. R. 209, 33 Am. & Eng. R. Cas., N. S., 209; State v. Pittsburg, C. C., etc., Ry. Co. (Ohio), 9 R. R. R. 168, 32 Am. & Eng. R. Cas., N. S., 168.

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to credit for the benefits paid from the relief fund and accepted by the employee, cannot plead the relief-fund agreement as a defense to the action.

Same.—The by-laws of the relief department of a railroad provided for the payment to injured employees of a certain sum per day "during the continuance of his disability." An injured employee received the daily sum up to a certain time, when he was given a "return to work card." After a week's work his wound began to grow worse and he was disabled from work, but was refused further benefits. Held, that the relief-fund agreement was violated by the railroad, and the employee could sue for damages for his injuries, notwithstanding a provision in the agreement that the relief-fund benefits should be accepted in full discharge of his claim for injuries.

Appeal from Appellate Court, First District.

Action by James A. Chapman against the Pennsylvania Company. From a judgment of the Appellate Court (118 Ill. App. 201), affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, brought by James A. Chapman against the Pennsylvania Company, operating the Pittsburg, Cincinnati, Chicago & St. Louis Railway, to recover for personal injuries sustained. The declaration alleges that on January 16, 1898, the defendant was operating a certain railroad in the southern portion of the city of Chicago, and plaintiff was engaged by defendant in assisting to switch cars of defendant under the direction of its employees, and while engaged in placing a certain link on a car, for the purpose of coupling the same to other cars, and while using due care and caution for his own safety, the defendant wrongfully, carelessly, negligently, improperly, and without warning to plaintiff, caused certain other cars and engines of defendant under the control of other employees of defendant to be violently run, thrown, or "kicked" against said car on which plaintiff was so engaged, causing the cars to bump or be thrown violently together, catching and crushing plaintiff's right hand, and causing a total loss of the same. The evidence shows that at the time of the accident the plaintiff was working for the defendant as a switchman in the yards at Fifty-Ninth street, in the city of Chicago, which consisted of a large number of tracks extending north and south. The part of the yard and tracks north of Fifty-Ninth street was called the north end of the yards, and the part south of that street was called the south end of the yards. As the trains came into the yards from the south, they were broken up by the switching crews, and the cars which were to go upon the different tracks in the north end of the yards were "kicked" across the street onto their proper tracks in the north end of the yards. The plaintiff was working in the north end with the transfer crew, consisting of the engineer, fireman, conductor, and three switchmen. It was the duty of the transfer crew to couple the cars together into trains after they had been "kicked" across the street, and to prepare the trains to be taken north to their various destinations in the city. The switching

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crew working in the south end of the yards had nothing to do with the cars after they were "kicked" across the street into the north end, and the transfer crew had nothing to do with the cars before that time. Several cars stood on track 16 in the north end of the yards. Plaintiff went between two of these cars for the purpose of getting them ready to be coupled together. While he was between them, the switching crew in the south end "kicked" a car across Fifty-Ninth street onto track 16 and against the car on which the plaintiff was working, catching his hand between the bumpers, causing the injury. Upon a trial before the court and a jury judgment was rendered for \$12,183.50, which has been affirmed by the Appellate Court for the First District, and to reverse this judgment an appeal has been prosecuted to this court.

George Willard (*Samuel P. Wheeler*, of counsel), for appellant.

J. R. Beckett, *B. F. Kleeman*, and *Kitt Gould*, for appellee.

WILKIN, J. (after stating the facts). It is first insisted as a ground of reversal that the appellant, the Pennsylvania Company, did not own or operate the tracks, engines, and cars in question, nor was the appellee in its employ at the time of his injury. In support of this contention it is contended that the tracks, engines, and cars in question were operated by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, commonly called the "Panhandle," and that the appellee was in the employ of the latter company at the time of the injury. Appellee contends that the Panhandle was a part of appellant's road and was being operated by it, and that he was in its employ. The suit was brought against the appellant company, and the declaration alleged that "the Pennsylvania Company, a corporation, operated the Pittsburgh, Chicago & St. Louis Railway company," and that the appellee was injured while the appellant was thus operating the road. To this declaration appellant filed the general issue only. In the case of *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362, we decided that the general issue alone does not put in issue either the character in which the plaintiff sues or the character or capacity in which the defendant is sued. In this case the appellant, by filing only the general issue, impliedly conceded that at the time of the alleged injury it was operating the particular line of road mentioned in the declaration, and that the operators in charge of the trains were its servants and employees. Independently of this question of pleading, evidence was offered by both sides as to the operation of the road at the time of the injury. Appellee testified that he was injured upon appellant's road while in its employ and while the road was being operated by it. Appellant offered evidence to show that the Panhandle Road was not owned or operated by it. The court instructed the jury that unless they believed from the evidence that the appellant company itself, or by a corporation

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known as the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, was operating the track and road at the time and place of the accident, then appellee could not recover. The operation of the road was a question of fact for the jury, which was properly submitted under the instructions of the court. There was evidence fairly tending to support the verdict, and for this further reason there was no error in the refusal of the court to instruct the jury to find for the defendant on the ground that the wrong company had been sued.

The appellee made application for employment November 26, 1897, to Walton, the superintendent of the Panhandle Company, and was employed by him. The next day he made application, in writing, for membership in the relief department of the company, and his application contained the following provision: "I agree that the acceptance of benefits from the said relief fund for injury or death shall operate as a release of all claims for damages against said company arising from such injury or death which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance. I also agree that this application, when approved by the superintendent of the relief department, shall make me a member of the relief fund and constitute a contract between myself and the said company, or with any other company that is now or may hereafter be associated with said company in the management of the relief department in case of the transfer of my service to any such other company during membership in the relief fund, and that the terms of this application and the regulations of said department shall, during my membership, be a part of the conditions of my employment by the said company or either of such other companies, and that the same shall not be avoided by any change in the character of my service or locality where rendered while in such employment." He was admitted to membership December 1, 1897, and was a member when the accident occurred. The Pennsylvania Company, at the time of the accident, was, and for some years before had been, associated with the Panhandle Company in the management of the relief department of the two companies, which was carried on in the name of the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." Under the by-laws of that department plaintiff was required to contribute to the department \$2.25 per month, and was entitled to receive from it, in case of disability, \$1.50 per day for the first 52 weeks, and 75 cents per day thereafter during the continuance of his disability. After his injury he was paid by the relief department benefits at the rate of \$1.50 per day from January 17 to August 15, 1898, in all 211 days, amounting to \$316.50. The medical examiner of the relief department then gave him a "return to duty card," which stated that he had recovered and would be able to return to duty August 16, 1898. He reported for duty and was on that day put to work. He

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worked less than a week when his wound broke open again and he was unable to continue. He then applied for further benefits to the medical director who gave him the card to return to duty and also to the person from whom he had received checks for the benefits which had been paid him, and was told that there was nothing in the relief department for him, that he had received all that he was entitled to, and he has been paid no benefits since August 15, 1898, and has been during at least a part of that time disabled and unable to work by reason of the injury sued for.

It is insisted by counsel that plaintiff waived his right of action against appellant by accepting benefits from the relief department, and that appellant is entitled to the benefit of the contract with the relief department. A similar contract was before us in the case of *Eckman v. Chicago, Burlington & Quincy Railroad Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750, and we there held that such agreements were valid and binding between the parties, and that the voluntary acceptance by a railroad employee of the benefits provided for in such an agreement, with the full knowledge that such contract provided that the acceptance of benefits under the same should operate as satisfaction of all claims against the railroad company by which he was employed, on account of injuries received, would be a bar to a subsequent suit for such injury. It is the receipt of benefits under the contract, and not the contract itself, that binds him. It is not claimed in this case that the plaintiff received the full benefits he was entitled to under his agreement with the relief department. On the contrary, the undisputed evidence is that his disability continued after he was given the card to return to duty and that his application for further benefits was refused. The by-laws, as we have said, entitled him to receive \$1.50 per day for 52 weeks, if his disability continued so long. He only received that amount for about 30 weeks, and was refused payment for the remainder of the time. The most that could be claimed would be that the medical examiner's "return to duty card" would be prima facie proof that his disability was removed. Here the evidence shows that his injury returned within a week, and the by-laws of the department clearly contemplate that in such case the relief benefits shall continue. Admitting this, however, counsel for appellant state their contention on this branch of the case as follows: "Our position upon this point is that the intended effect of the contract was that the acceptance of benefits—not all the benefits, but any benefits—under the contract by appellee was intended to have the effect of releasing any cause of action the appellee then had for the injuries received." If this position is tenable, then, if plaintiff had received a single week's benefits and been denied and refused all further payments, however serious may have been his injury, he would have been absolutely barred of his action against the company.

While we see no reason why, under the facts, the appellant company may not avail itself of the benefits of the agreement between the relief department of the Panhandle Company and

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plaintiff, that contract must receive a reasonable construction, and it must appear that the contract, so reasonably construed, was complied with on the part of the appellant. We agree with counsel that the contract must be interpreted according to the intent of the parties, but we do not think it can be seriously contended that it was contemplated in this case that either party should be bound by a partial performance on the part of the other. The whole contract must be construed together. The agreement on the part of the plaintiff that the acceptance of benefits from the relief fund should operate as a release of all claim for damages against the company is to be construed in connection with the by-laws, which amount to an agreement on the part of the relief department that it would pay him certain specified benefits. A party cannot be allowed to avail himself of the benefits of a contract which he has admittedly violated. If the defendant below had shown that the plaintiff received the full benefit of his contract or that his failure to do so was the result of his own fault, it might well have been said that this suit was thereby barred. That is not this case, the distinguishing feature of which is that the relief department refused to pay further benefits. Had the plaintiff refused to receive those benefits, as in cases cited by counsel, a very different question would be here presented. The breach of the contract in this case was that of the defendant alone. To sustain the position of counsel for appellant would be to hold that, whenever an employee of a railroad company becomes a member of the relief department and receives any benefits whatever therefrom, he must be conclusively held to have elected to look to that department alone for all damages sustained while in the service of the company. We know of no authority or good reason for such a position. In our opinion, upon the failure on the part of the company to comply with the terms of the agreement, the plaintiff had the right to bring his action against it, and that the company is only entitled to credit for the amount shown to have been paid by the relief department, but cannot successfully plead the agreement in bar of this action without showing a compliance with the same on its part.

Objection is next made to the refusal of the tenth instruction offered by appellant, which was to the effect that, unless appellant operated the road in question, the plaintiff could not recover. The substance of this instruction was given in another instruction, and hence appellant has no cause for complaint.

Complaint is also made of the refusal of the court to give to the jury the thirteenth instruction offered on behalf of appellant. This instruction attempted to define the term "fellow servants." The substance of this instruction was also covered by another instruction given to the jury.

Upon a consideration of the whole case we find no reversible error, and the judgments of the circuit court and Appellate Court will be affirmed.

Judgment affirmed.

CHOCTAW, O. & G. RY. CO. *v.* DOUGHTY.

(Supreme Court of Arkansas, Oct. 28, 1905.)

[91 S. W. Rep. 768.]

Master and Servant—Injuries to Servant—Actions—Pleading.*—A complaint against a railroad for the death of a fireman, which alleged that the death was caused "by the negligence and carelessness of the agents and servants of defendant," and "by reason of such negligence and carelessness of said defendant," sufficiently excluded the idea that the death was caused by the negligence of fellow servants of the decedent, and was good against a demurrer for want of facts.

Pleading—Defective Pleading—Remedies—Motions.—The proper remedy for the failure of a complaint against a master for injuries to a servant, to show the particular acts of the particular agents of the master which constituted the negligence complained of, is by a motion to make specific.

Appeal—Review—Estoppel to Allege Error.—Where evidence is excluded over defendant's objection, defendant cannot, on appeal, complain of such exclusion, nor draw presumptions in his favor from the excluded evidence.

Master and Servant—Injuries to Servant—Negligence of Master—Res Ipsa Loquitur.†—In an action against a railroad for the death of a fireman, the burden which rests upon plaintiff of showing that the injury was caused by defendant's negligence is discharged by showing that the injury was caused in a collision of trains brought about by servants of the railroad who were not fellow servants of the decedent, under circumstances from which a presumption of negligence necessarily arises.

Same—Fellow Servants—Who Are Fellow Servants.‡—Under Sand. & H. Dig. § 6248, providing that persons engaged in the operation of a railroad, who are intrusted with the duty and authority of superintendence of other persons in the railroad service, are vice principals of the railroad, and not fellow servants with those superintended by them, a train dispatcher, who governs the movement of trains and originates their running orders, and a conductor, under whose direction

*For the authorities in this series on the subject of pleading negligence, see foot-notes appended to *Malott v. Sample* (Ind.), 17 R. R. R. 595, 40 Am. & Eng. R. Cas., N. S., 595; foot-notes appended to *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26.

†For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see foot-note appended to *Stewart v. Raleigh & Augusta, etc., R. Co.* (N. Car.), 17 R. R. R. 811, 40 Am. & Eng. R. Cas., N. S., 811; *Fuller v. Ann Arbor R. Co.* (Mich.), 17 R. R. R. 594, 40 Am. & Eng. R. Cas., N. S., 594; foot-notes appended to *Baltimore & O. R. Co. v. State* (Md.), 16 R. R. R. 399, 39 Am. & Eng. R. Cas., N. S., 399.

‡For the authorities in this series on the question whether train-dispatchers and telegraph operators are fellow servants of trainmen, see foot-notes appended to *Santa Fe Pac. R. Co. v. Holmes* (C. C. A.), 16 R. R. R. 248, 39 Am. & Eng. R. Cas., N. S., 248.

For the authorities in this series on the question whether a conductor is a fellow servant of a member of his train crew, see foot-notes appended to *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 14 R. R. R. 715, 37 Am. & Eng. R. Cas., N. S., 715; extensive note; appended to

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a train is actually run, are not fellow servants with a fireman on the train.

Same—Contributory Negligence.—It is not contributory negligence in law for a fireman to fail to keep a lookout on a curve where it is impossible for the engineer to keep an efficient lookout; but whether he is guilty of contributory negligence under such circumstances is a question of fact for the jury.

Same.—The statute requiring persons running trains to keep a constant lookout for persons and property upon the track is designed for the protection of third persons and their property, and imposes on a railroad fireman no duty to keep a lookout for his own protection.

Negligence—Contributory Negligence—Burden of Proof.§—Contributory negligence will not be presumed, but is a matter of defense to be proved by defendant, unless it is shown by plaintiff's evidence.

Master and Servant—Injuries to Servant—Contributory Negligence.—Where a fireman was killed while standing in the gangway of the engine, where he was required to stand in firing, and there was no evidence that the engineer had ordered him to keep a lookout and he had failed to respond, nor proof that at the time he was killed he was not doing his duty, he was not guilty of contributory negligence.

Same—Duty of Railroad—Safe Place to Work.**—It is the duty of a railroad to exercise ordinary care in operating its trains, and to provide its servants a safe field for operation.

Death—Damages—Excessive Verdict.—In an action against a railroad for the death of a fireman, the evidence showed that deceased left surviving him a wife and small child; that he was about 27 years old; that his expectancy was 36.41 years; that he was industrious, sober, frugal, affectionate, and turned his earnings over to his wife; that his wages were from \$75 to \$85 per month; that he was in the line of promotion; and that he would, as engineer, have received about twice the wages of a fireman. Held, that a verdict for \$12,500 was not excessive.

Appeal from Circuit Court, Saline County; Alex. M. Duffie, Judge.

Action by Flora E. Doughty, as the administratrix of the es-

Alabama Great So. R. Co. v. Baldwin (Tenn.), 14 R. R. R. 9, 37 Am. & Eng. R. Cas., N. S., 9.

As to the superior servant limitation of the fellow servant rule, see extensive note appended to Illinois Cent. R. Co. v. Elliott (Ky.), 16 R. R. R. 145, 39 Am. & Eng. R. Cas., N. S., 145.

§For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to Coolbroth v. Pennsylvania R. Co. (Pa.), 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419.

**For the authorities in this series on the question of the degree of care due from a railroad company to its employees, see generally, foot-notes appended to Southern Pac. Co. v. Hetzer (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; Lewis v. Vicksburg, etc., Ry. Co. (La.), 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; foot-note appended to Malott v. Sample (Ind.), 17 R. R. R. 595, 40 Am. & Eng. R. Cas., N. S., 595; foot-note appended to De Mase v. Oregon R. & Nav. Co. (Wash.), 17 R. R. R. 322, 40 Am. & Eng. R. Cas., N. S., 322.

For the authorities in this series on the subject of the care required of a railroad company to furnish its servants a safe place to work, see foot-notes appended to Southern Pac. Co. v. Gloyd (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to Dean v. Oregon R. & Nav. Co. (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

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tate of A. Watt Doughty, deceased, against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

That part of the complaint purporting to state the cause of action is as follows: "That on September 17, 1902, the said A. Watt Doughty was in the employment of the said defendant company as fireman upon one of its freight trains running from Hot Springs to Little Rock, Ark., and while he was thus engaged in the discharge of his duty as such fireman on said defendant's freight train, as it approached the city of Little Rock and within about one mile of the defendant company's depot in said city, on said 17th day of September, 1902, between 12 and 1 o'clock of said day, by the negligence and carelessness of the agents and servants of said defendant company said freight train collided with a passenger train of said defendant company, producing a terrible wreck and causing the death of the said A. Watt Doughty while he was engaged in the discharge of his duty in said employment and without fault of his own, who departed this life on said day intestate by reason of such negligence and carelessness of said defendant company, leaving surviving him the said Flora E. Doughty as his widow, and Willie L. Doughty, aged two years, as his only child and the next of kin of the said deceased. That plaintiff alleges that by reason of the wrongful killing and death of the said A. Watt Doughty, caused as aforesaid, by the negligence and carelessness of the agents and servants of said defendant company, the said Flora E. Doughty as the widow, and the said Willie L. Doughty, as the next of kin, of said deceased, have been damaged in the sum of fifty thousand dollars." To this appellant demurred, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the defendant excepted to the ruling. Defendant filed an amended answer, admitting that deceased, Doughty, was its fireman, that he was killed in the collision mentioned in the complaint, and at the time was in the discharge of his duty, but denying that the collision was caused by the negligence and carelessness of the agents and servants of the company, and denying that Doughty's death was caused by the negligence and carelessness of the defendant company. The answer in appropriate words sets up the defense of "assumed risks," "injury by fellow servant," and contributory negligence. The verdict and judgment were for \$12,500. Other facts will be stated in the opinion.

E. B. Peirce, for appellant.

E. H. Vance, Jr., for appellee.

WOOD, J. (after stating the facts). 1. "The true doctrine," says Mr. Pomeroy, "to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations

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of these facts are imperfect, incomplete, or defective, such insufficiency pertaining to the form, rather than the substance, the proper mode of correction is, not by demurrer, nor by excluding the evidence at the trial, but by a motion to make the averments more definite and certain by amendment." Pomeroy, Rem. and Rem. Rights, § 549. The complaint was in bad form; but, taking it altogether, it charges that the negligence of the agents and servants of appellant, which caused the collision and resultant death of Doughty, was the negligence of appellant. In other words, it in effect charges that the death of Doughty was brought about by the negligence of appellant, in that its agents and servants by their negligence and carelessness caused a collision of trains which produced his death. The charge that Doughty's death was caused by the negligence of the company, through the negligence and carelessness of its agents and servants in causing a collision of trains, necessarily involved the idea that the alleged negligent act was not the act of fellow servants. For if the act of a fellow servant, appellant, in a legal sense, was not negligent and not liable. *Railway Co. v. Duffey*, 35 Ark. 602; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Railway v. Shackelford*, 42 Ark. 417; *Railway v. Harper*, 44 Ark. 524; *Railway v. Morgart*, 45 Ark. 318; *Railway v. Gaines*, 46 Ark. 555; *Railway v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; *Railway v. Torrey*, 58 Ark. 217, 24 S. W. 244; *Railway v. Henson*, 61 Ark. 306, 32 S. W. 1079; *Railway v. Becker*, 63 Ark. 477, 39 S. W. 358; *Railway v. Brown*, 67 Ark. 306, 54 S. W. 865. It therefore devolved upon appellee to show that the alleged negligent acts complained of were done by a class of servants for whose negligence appellant was liable, before recovery could be had under this complaint. But, under the liberal rules of the reformed procedure we are of the opinion that the allegations of the complaint, while loose and inartistic in language and form, were yet sufficient to admit such proof. If the allegations were deemed insufficient, in that they failed to show the particular acts of the particular agents which constituted the negligence of the company, a motion to make more specific was the remedy. *Bushey et al. v. Reynolds et al.*, 31 Ark. 657; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Murrell v. Henry*, 70 Ark. 161, 66 S. W. 647. "In construing a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties." Applying this statutory rule to the case in hand, it seems to us reasonably clear that the complaint states a cause of action. If we concede that the complaint fails to state a cause of action, because it fails to show either by positive averment, or by statement of facts, from which such inference is inevitable, that the negligence complained of was the negligence of other than fellow servants, still the appellant's demurrer cannot avail here. For, instead of resting on its demurrer, it answered over and accepted the issue on this, the only ground upon which the

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complaint was demurrable, if at all. The answer contains the following language: "If his [Doughty's] death resulted from the negligence act or omission of anyone, that such act or omission of duty was an act of a fellow servant, for which this defendant was not liable." Thus the appellant treats the complaint as if it set up that the negligence complained of was the negligence of other than fellow servants, and denies same, in effect, by alleging that the "negligent act or omission was an act of fellow servant." "A defect in pleading is aided, if the adverse party pleaded over to, or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied, or rendered formal or intelligible." 1 Chit. Pl. 671; Bliss, Co. Pl. § 437; Pindall v. Trevor, 30 Ark. 249; Davis v. Hare, 32 Ark. 386; Webb v. Davis, 37 Ark. 551; Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

2. The train upon which Doughty was killed was a regular mixed local train from Hot Springs to Little Rock. It was going east and collided with an extra or irregular train going west, about one mile from Little Rock Station, about 2:30 p. m. The engineer upon the regular train received his orders as to that train at Batterfield Station. Under the rules of the company for running of trains, a regular train had the right of way of the track over all extra trains. At Hot Springs Junction, three miles south of Little Rock, defendant company maintained a regular registering station, where all trains were required by it to stop and see that all overdue trains had arrived, registered, and passed, and it was the duty of the conductor in charge of each train to stop at this registering station and register his train. Levi Greer, the conductor on the train upon which deceased was fireman, stopped his train at this junction, and, after remaining there two or three minutes, ordered the engineer of said train to pull out. There was no telegraph station or depot agent or other employee at the junction to give orders to passing trains, and there was no effort made by the conductor or any one else to stop the train after it left the junction before the collision. Signals for the handling of the train were received from the conductor, through the fireman or brakeman. The air brakes on the train were working all right. The chief dispatcher of the district was located at Little Rock. All trains in the district were in his charge. He originated the running orders of the trains, and the actual running of the train was under the direction of a conductor. But the engineer also received orders from the dispatcher for the running of trains, and was equally responsible for their safety. Regular trains were run on schedule time. On this occasion the regular train was behind time. When the collision occurred Doughty was killed, and his body was lying, when first found, in the gangway of the engine, where he was required to stand while putting coal from the tender into the fire box. It is manifest from these facts, which are undisputed, that the collision was the result of the negligence of either the con-

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ductor in not observing orders, if properly given, for the running of the trains, or of the train dispatcher in not giving proper orders. It was impossible for this collision, under the proof, to have occurred in any other way. The engineer was not negligent, and Doughty, the fireman, was not negligent, for he was found dead at his post. Then how else could it have happened, save through the negligence of the train dispatcher in giving improper orders for the running of these colliding trains, or of the conductors, one or both, in running their trains in disobedience to orders, if proper orders were given? The orders that were given were not permitted to be read to the jury, over the objection of appellant. Appellant, therefore, will not be permitted to complain that the orders were not read, or that such orders would have exonerated its servants from the charge of negligence. No presumptions will be indulged in its favor in this respect, when it was instrumental in preventing the orders from going before the jury. The conductor of the regular train, if running under proper orders, was certainly negligent in not observing that the extra had not reached Hot Springs Junction when his train arrived there. And if he was not negligent in failing to observe this fact, then the conductor on the extra was negligent in failing to keep his train out of the way of the regular; or, if neither of these was negligent in the discharge of their duties, then the dispatcher should have so ordered the running of these trains as to have made the collision impossible. The injury complained of here was caused in the operation of appellant's road, over which it had entire control. The deceased was without fault. While the burden was upon the appellee to show that the injury complained of was caused by the negligence of appellant, that burden has been discharged by showing that the injury was caused in a collision of trains, produced by those who were not fellow servants, under circumstances from which a presumption of negligence necessarily arises. In *Holbrook v. Railway Co.*, 12 N. Y. 236, 64 Am. Dec. 502, it is said: "If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises."

"The true rule," says Mr. Elliott, "would seem to be that when the injury and circumstances attending it are so unusual, and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." 4 Elliott, R. R. § 1644; *Price v. Railway Co.* (Ark.), 88 S. W. 575; 2 Wood on R. R. p. 1560; *Scott v. London, etc., Docks Co.*, 3 Hurl. & Colt. 596; 1 Thompson, Com. Law of Neg. § 15.

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3. Plaintiff's instructions numbered 1, 2, 3, and 5, told the jury (1) that if deceased was injured by the negligence of two or more co-employees, one of whom was not a fellow servant, plaintiff could recover; (2) that the train dispatcher was not a fellow servant of deceased, and if he was negligent in ordering the movement of trains whereby deceased was injured, or in failing to give proper orders, plaintiff could recover; (3) that the conductor, under certain conditions, was not a fellow servant of deceased, and if he was guilty of negligence, which caused the death of deceased, plaintiff could recover; and (5) that the act of a vice principal was the act of the master. It is conceded that, in the abstract, these instructions were correct; but, as applied to this case, it is contended there was no evidence upon which they could be based. The train dispatcher and the conductor under the proof were not fellow servants of Doughty. Sand. & H. Dig. § 6248. And it follows from what we have just said that there was no prejudicial error in the giving of any of these instructions. The fourth instruction, given at the request of the appellee, was as follows: "The court instructs the jury that the servant has a right to presume the master will do its duty, and he is not necessarily required to keep a lookout for an approaching train on the track, where the train on which he was a fireman had the right of track, and if you believe from the evidence in this case that the defendant company ordered the movement of its trains whereby the train on which the deceased was fireman collided with an extra train of the defendant company, which extra train was under the rules of said company required to keep out of the way of the train on which the deceased was fireman, then the defendant would be guilty of negligence." It is contended by appellant that the court erred in giving this instruction, and in refusing to give its requests for instructions numbered 6, 7, and 11, which told the jury that if they should find from the evidence that by reason of a curve in the track it was impossible for the engineer to keep an efficient lookout upon the track, it then devolved upon the fireman to keep such lookout, and, if he failed to perform that duty, and such failure contributed to his death, their verdict would be for the defendant. Conceding that there was evidence upon which to base appellant's requests, the court did not err in refusing them. It was not contributory negligence, as matter of law, for the fireman to have failed to keep a lookout on a curve where it was impossible for the engineer to keep an efficient lookout. Whether such failure was contributory negligence would be a question of fact for the jury. The "lookout" statute, and decisions construing same relied upon by appellant, are not applicable to a case of this kind. That statute was designed for the benefit and protection of "persons and property upon the tracks" of railroads. The statute has reference, not to the railroads themselves, or their employees while operating trains, but to third persons. The requests were erroneous, also, for the reason that they cast the burden upon ap-

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pellee to exonerate the deceased fireman from the charge of contributory negligence. Contributory negligence, as has been repeatedly held by this court, will not be presumed. It is a matter of defense, and, when alleged, must be proved by the defendant, unless the evidence developed by the plaintiff shows it. *Railway v. Orr*, Adm'r, 46 Ark. 182; *Railway v. Atkins*, 46 Ark. 436; *Railway v. Leverett*, 48 Ark. 348, 3 S. W. 50, 3 Am. St. Rep. 230; *Railway v. Eubanks*, 48 Ark. 475, 3 S. W. 808, 3 Am. St. Rep. 245; *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679; *Hot Springs St. R. R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245.

Furthermore, there was no evidence of contributory negligence. Doughty was found where his duties primarily required him to be in order to keep up the fire in the engine. For aught that appears to the contrary, the position of his dead body indicated that he was killed while in the discharge of duty. There was no proof by the engineer that Doughty had been ordered by him in an emergency to keep a lookout, and that he had failed to respond. There was no proof whatever that Doughty, at the time he was killed, was not doing his duty. There was no evidence, therefore, upon which to base a charge of contributory negligence, and the instruction upon the subject after the close of the argument was more favorable to appellant than the evidence warranted. That instruction was as follows: "In view of the fact that counsel in their argument before the jury have often referred to the statutory duty of keeping a lookout, I will say this to you: The statutory duty requiring 'all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track' does not necessarily apply in this case. It is for you to say whether the deceased, at the time of his injury, was in the exercise of ordinary care and caution in the discharge of his duties, and if, at the time of his injury, he was in the exercise of ordinary care and caution, he would not be guilty of contributory negligence, although he was, at the time of his injury, not keeping a lookout." There was no error in giving appellee's fourth request. It is the company's duty to exercise ordinary care in operating its trains, and to provide its servants a safe field for operation. *Railway v. Eubanks*, 48 Ark. 474, 3 S. W. 808, 3 Am. St. Rep. 245; *Railway v. Jagerman*, 59 Ark. 98, 26 S. W. 591; *Jones v. K. C., Ft. S. & M. Ry. Co.* (Mo. Sup.) 77 S. W. 895. The court left it to the jury to say whether the fireman should have been keeping a lookout, which, as we have said, in the absence of proof tending to show that he was not keeping a lookout, was more favorable to appellant than it had the right to ask.

4. The verdict was not excessive. Doughty had a wife, and one child. He was 26 years and 9 months old. His expectancy was 36.41 years. He was industrious, sober, of good moral character, and had graduated in the common school. His wages were from \$75 to \$85 per month, and he had been twice

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before promoted by the defendant, and was in the regular line of promotion. An engineer received about twice the wages of a fireman. He was frugal in his habits and of affectionate disposition. He turned his earnings over to his wife for the support of the family. His child was 2 years of age. According to the rule announced by this court in *Railway v. Sweet*, 63 Ark. 563, 40 S. W. 463, and the verdicts approved in many other cases where the facts in favor of appellees were certainly no stronger than in the case at bar, we do not see our way clear to reduce this verdict. *Railway v. Harrell*, 58 Ark. 454, 25 S. W. 117; *Railway v. Mathis, Adm'r* (Ark.) 91 S. W. 763; *Railway v. Hitt* (Ark.) 88 S. W. 908; *Railway v. Cleere* (Ark.) 88 S. W. 995; *Railway v. Grant* (Ark.) 88 S. W. 580. See, also, cases from other states cited in brief for appellee.

5. Appellee, upon the undisputed facts, was entitled to a verdict. The remarks of counsel in argument, therefore, if erroneous, could have no other effect than to increase the verdict. It is unnecessary to set out and discuss at length the remarks of counsel objected to by appellant. We are of the opinion that some of the remarks were improper, and that the court should have excluded them. But, in view of the argument made by the attorney for appellant, which was not warranted by the proof, to which the most objectionable of the remarks by appellee's counsel are shown to be in reply, and, as we have concluded that the verdict was not excessive, we are of the opinion that the remarks, even though erroneous, were not prejudicial.

Affirm the judgment.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. HOPKINS, Police Judge, et al.

(Court of Appeals of Kentucky, Jan. 31, 1906.)

[90 S. W. Rep. 594.]

Taxation—Double Taxation.*—Ky. St. 1903, § 4096, relating to taxation of railroads, provides that a railroad is to be valued as an entire piece of property "for the purpose of being operated as a carrier of freight and passengers." Const. § 174, authorizes the General Assembly to provide for taxation of corporations based on income, licenses, franchises; and Ky. St. 1903, § 4077, provides for a franchise tax "in addition to the other taxes imposed" by law on public service corpora-

*For the authorities in this series on the subject of double taxation of railroad companies, see *People v. State Board Tax. Commissioners* (U. S.), 17 R. R. R. 388, 40 Am. & Eng. R. Cas., N. S., 388 (street railway not exempt, by contract with city for payment of license fee on each street car, from tax imposed under N. Y. Laws 1899, Chap. 712, on its franchise); *Chicago, etc., R. R. v. Richardson County* (Neb.), 14 R. R. R. 665, 37 Am. & Eng. R. Cas., N. S., 665.

For the authorities on this series on the subject of the right to impose occupation tax on railroad companies, see foot-notes appended to *Norfolk & W. Ry. Co. v. Suffolk* (Va.), 14 R. R. R. 440, 37 Am. & Eng. R. Cas., N. S., 440.

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tions, and the valuation of this corporate franchise by the state board of valuation and assessment is made the basis for municipal taxation in every municipality in which the corporate franchise may be exercised. Held, that the franchise tax authorized by such section is intended to cover all the intangible property of such corporation as represented by the earning value of its capital employed in the specific business in which it is engaged, and that, where franchises have been so valued and apportioned to a city and the franchise tax paid thereon by railroad and telephone companies, the municipality cannot impose an occupation tax, as a revenue measure, for the transaction of business by such corporations.

Municipal Corporations—Taxation—Constitutional and Statutory Provisions.—Const. § 181, provides that the General Assembly may by general laws confer on municipal corporations the power to assess and collect taxes, and may by general laws delegate the power to towns, cities, and other municipal corporations to impose and collect license fees on franchises. Pursuant to such provision, Ky. St. 1903, § 3637, subsec. 4, confers powers on municipal corporations to impose and collect license fees on all franchises, trades, and occupations, not in conflict with the Constitution. Held, that the power so given is a revenue provision, being so treated in its classification by the Constitution, though in the statute it is coupled with other matters more properly coming under the head of police powers.

Taxation—Uniformity—Double Taxation.†—Under Const. § 171, requiring that taxes shall be uniform upon all property subject to taxation, a city ordinance imposing a license fee upon the business of handling for pay telephone messages in the city and upon the business of selling railroad tickets by corporations that have been required to pay a franchise tax covering the same privilege is invalid.

Same.—Const. § 181, providing that the General Assembly may delegate the power to towns, cities, and other municipal corporations to impose and collect license fees on franchises, does not contemplate that the Legislature may authorize a city to tax the same privilege twice for the same year as against the same owner.

Telegraphs and Telephones—Licenses.—Where a city offered for

†For the authorities in this series on the subject of uniformity of taxation, see note appended to *State v. Manchester & L. R. R.* (N. H.), 12 Am. & Eng. R. Cas., N. S., 874 (uniformity and equality in taxation); *Coulter v. Louisville & N. R. Co.* (U. S.), 17 R. R. R. 409, 40 Am. & Eng. R. Cas., N. S., 409 (federal constitution does not forbid state taxation of the franchise of a domestic corporation at a different rate than is assessed upon the tangible property in the state); *State v. Back* (Neb.), 14 R. R. R. 99, 37 Am. & Eng. R. Cas., N. S., 99 (method of bringing about uniformity of valuation in respect to all property subject to municipal taxation where railway property within city is to be assessed); *Kidk v. State* (U. S.), 7 R. R. R. 518, 30 Am. & Eng. R. Cas., N. S., 518 (equal protection of the law not denied by provisions of Ala. Code 1896, § 453, cl. 13, and Code 1896, § 3911, cl. 14, for taxation of railroad stock, because of exemption of stock in domestic railroads and in others that list substantially all their property for taxation); *Florida Cent. & P. R. Co. v. Reynolds* (U. S.), 1 R. R. R. 463, 24 Am. & Eng. R. Cas., N. S., 463 (railroad company not denied equal protection by Florida Statute providing for assessment for omitted taxes); *State v. Canada Cattle Car Co.* (Minn.), 1 R. R. R. 449, 24 Am. & Eng. R. Cas., N. S., 449 (statute of Minnesota providing for the taxation of property of corporations engaged in interstate commerce, unconstitutional as unequal taxation); *Oregon & C. R. Co. v. Jackson County* (Ore.), 22 Am. & Eng. R. Cas., N. S., 98 (arbitrary and fraudulent assessment and equalization of railroad land under laws of Oregon).

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sale for a term of years the franchise to erect, maintain, and operate a telephone exchange and to do a telephone business in the city, and the franchise was purchased for a stipulated price per year, payable annually, a subsequent ordinance imposing an additional charge for the privilege of handling for pay telephone messages in the city was unauthorized and void.

Paynter, J., dissenting.

Appeal from Circuit Court, Henry County.

"To be officially reported."

Separate suits by the Cumberland Telephone & Telegraph Company and the Louisville & Nashville Railroad Company against W. A. Hopkins, police judge of the city of Eminence, and another, to prohibit the enforcement of an occupation tax. From a judgment dismissing the petitions, plaintiffs appeal. Reversed.

Willis & Todd, Henry L. Stone, Thos. B. Harrison, Jr., and John Harding, for appellants.

G. Allison Holland and D. A. Sachs, for appellees.

O'REAR, J. The two cases styled above present a common question, though the former presents in addition a single other question for decision. The cases were heard together in this court. Appellant telephone company operated a telephone exchange in the town of Eminence, in connection with its long-distance telephone service, extending through that town to other and remote points in and out of this state. Appellant Louisville & Nashville Railroad Company is a chartered railroad corporation, created by the laws of this state and operating lines of railroad in and out of the state, one of which passes through the town of Eminence. Eminence is a city of the fifth class of this state. Among its corporate powers conferred by the Legislature is section 3637, subsec. 4, Ky. St. 1903, which reads: "To impose and collect license fees and taxes on stock used for breeding purposes, and on all franchises, trades and occupations," but "not in conflict with the Constitution or laws of this State or of the United States." This power was expressly allowed by the Constitution by section 181 of that instrument, which is as follows: "Sec. 181. The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions." The city of Eminence by its council enacted ordinances imposing a license fee of \$50 per annum upon the business for handling

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for pay telephone messages in the city, and upon the business of selling railroad tickets in the city of Eminence or for handling freight for pay in said city an annual license fee of \$25. Penalties were provided for carrying on either business without first having paid the license fees. These suits were brought against the police judge and the city for a writ of prohibition to test the constitutionality of the ordinances, each appellant being proceeded against for their violation. The circuit court dismissed the petitions, thereby holding the ordinances valid.

Railroad and telephone companies are required to pay to the state a franchise tax, as well as being required to pay a franchise tax to each county, city, or town in which it may be exercised, if such municipality imposes an ad valorem tax. Section 4077, Ky. St. 1903; section 174, Const. These companies are included in what are called "public service corporations," exercising powers and having privileges not enjoyed by natural persons or other corporations. The main point of contention is, what is the franchise upon which these taxes are imposed? A corporation's franchise may be one thing or another. The word is not always used with reference to the same meaning. It is sometimes regarded as the mere right to be a corporation. Again, it is treated as the right to do the particular and peculiar business for which the corporation was created. It is also spoken of as the right to do its business in a certain locality, as, for example, where the Constitution requires certain franchises to be sold by cities and towns. Section 164, Const. The other two qualities of a corporate franchise may have existed before the acquisition of the latter, and are therefore in a sense quite distinct from it. For the purposes of taxation, it may be all of them and more. *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73. While corporate franchises have long been recognized factors of incorporated beings, they have only recently come to be regarded as separate subjects of taxation. In the rapid development of these artificial creatures of the law (corporations) as means of holding and using property in active business, the corporate franchise has come to have a recognized value of enormous magnitude, when viewed in the aggregate. It is not the least—indeed, frequently is the greater—element of the corporation's wealth. That it should be taxed, should be made to bear its share of the public burden together with all other wealth, is fundamentally true in justice and in political economy. So far, no exact definition of it has been given upon which the courts have felt willing to finally rest the matter. And perhaps it is well enough for the present that this is so. Still certain qualities of the corporate franchise are so well known and classified as to be beyond dispute as being elements of its taxable value. The mere right to be a corporation is taxed, in the exacting of the organization tax upon its creation. This is collected once, and absolutely without reference to its property or whether it ever engages in the business contemplated by

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its articles. Section 4226, Ky. St. 1903. The right of certain corporations to do business in a city, which it must acquire (if acquired since the present Constitution) by purchase of the franchise from the city, includes the compensation for occupying the public thoroughfares of the city. But it also may include more than that, which will be further noticed in this opinion. Each of these are qualities of the general corporate franchise. Yet, as used in the taxing statute of this state, the word has a more comprehensive meaning. It is treated as property. It is property. It adds materially to the value of the tangible property of the corporation. The right to exercise the powers allowed to the corporation by law, the peculiar and exceptional privileges it enjoys, partaking partially of the quality of sovereignty, give to its use of its tangible property, as well as to its intangible property comprised within its capital stock, a value which otherwise could not attach to them, so that this privileged use becomes to the visible assets of the corporation what the leaven is to the loaf. While it may not be laid hold of separately, it is quite capable of being conceived and valued as a thing worth so much money. This value will depend largely upon its money-earning capacity as it may be employed, and depends at last upon its being exercised. Unless used substantially as outlined in the articles under which it is created, it could scarcely be said to have a money value at all. For, unlike tangible property, or even choses in action, it cannot be sold and trafficked in, nor consumed, nor otherwise enjoyed than in the corporate use of it. It is true that by statute, as construed by this court in *Henderson Bridge Co. v. Commonwealth*, *supra*, when treating of railroad corporations, the franchise is deemed to include so much of the capital of the corporation and of its other intangible assets as is represented by the difference between the total value of its money-earning capacity and the separate value of its tangible property. The franchise of a railroad company may then be accepted for purposes of taxation as the earning value ascribed to its capital by reason of its operation as a common carrier of freight and passengers. Further than that the legislation in this state on that subject has not gone.

Railroads are required to pay taxes upon their tangible property. The mode of taxing it is set out by statute. Sections 4096-4104, Ky. St. 1903. It is to be valued as an entire piece of property "for the purpose of being operated as a carrier of freight and passengers." Section 4096, Ky. St. 1903. That is, the roadbed, including right of way and tracks, depots, sidings, and its cars, equipage, and tools, are to be taxed in the aggregate as a railroad. The franchise tax is "in addition to the other taxes imposed on it by law" (section 4077, Ky. St. 1903), and is meant to cover all the intangible property of the concern, as represented by the earning value of its capital, employed in the specific business of a carrier of freight and passengers. The valuation of this corporate franchise by the state board of valua-

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tion and assessment is made by section 4077, *supra*, the basis for municipal taxation in every municipality in which the corporate franchise may be exercised. In the case at bar it is conceded that appellant railroad company's franchise was so valued and was certified as apportioned to the city of Eminence and the franchise tax paid thereon for the year in controversy. The power given to municipal corporations by section 181, Const. and section 3637, Ky. St. 1903, to impose and collect license fees upon all franchises, is a revenue provision. It is so treated in its classification by the Constitution, and though in the statute it is coupled with other matters more properly coming under the head of police powers, it is in its scope and effect still an act to raise revenue for the town in one of the ways permitted by the Constitution. For appellees, it is contended that the franchise tax, which is collected off of appellant railroad company under the general assessment of its franchise, being a property tax, is quite distinct from the occupation tax which the town, under the legislative authority, has imposed. But it is not. It is the same thing; at least, the franchise tax includes the valuing of the capital stock of the railroad when and in the event only it exercises the very privileges sought to be taxed again by the ordinance. The same property may be indirectly and incidentally taxed twice is conceded, as, for example, where the owner of mortgaged land pays taxes on it, and the owner of the mortgage pays taxes on the evidence of the debt. But it is not the policy of the state to tax the same property twice as against the same owner. The Constitution requires that taxes shall be uniform upon all property subject to taxation. Section 171, Const. If the same property were taxed twice for the same purpose as against the same owner, whereas other property was taxed but once for that purpose as against its owner, the taxation would not be uniform. It would violate, not only the letter of the Constitution, but that spirit of absolute equality before the law which is at the bottom of all free government. The owners of other tangible property in Eminence are not taxed on the privilege of employing it in a certain business, either directly or indirectly, when it is assessed *ad valorem*. Therefore, when they are required to pay an occupation tax, as they have no franchise to be taxed or which is taxed, the license fee which they pay is not duplicate taxation in any sense.

Railroad property has always been regarded as an entirety in this state for purposes of taxation. *Applegate v. Ernest*, 3 Bush, 648, 96 Am. Dec. 272; *E. & P. R. R. Co. v. Trustees*, 12 Bush, 233; *Graham v. Mt. Sterling Coal R. Co.*, 14 Bush, 425, 29 Am. Rep. 412. It is made the subject of special consideration by the present Constitution (section 182), which directed that until changed by legislation the mode of taxation then in existence should prevail. No such change has been indicated, save as taxation of its franchise. General terms, not necessarily indicating a departure from a long-settled policy of taxation,

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which is, indeed, continued in the present statutes, will not be deemed as applicable to that policy, where it appears they were not used in special connection with the subject of such policy, but were employed broadly, so that they embrace many of other matters coming within their meaning, and can be applied only inferentially to the particular subject. As was said in *Neumeyer, Auditor, v. Krakel*, 110 Ky. 624, 62 S. W. 518: "It is a well-settled rule that an isolated expression in an act will not ordinarily be so construed as to conflict with a general legislative policy." If so radical a change in the existing and long-continued policy of the state to tax such properties as entireties, and not fragmentarily, had been contemplated by the Legislature, it would not have undertaken to make it in such an obscure way as this. It was not contemplated by section 181 of the Constitution, quoted, that the Legislature could authorize a city to tax the same privilege twice for the same year as against the same owner. The railroad being operated in Eminence is a part of appellant railroad company's system. It no longer has an option whether it will continue to carry freight and passengers to and from that town. It is bound to do it or forfeit its charter. Never before has it been thought that the state could require its creatures under such severe penalties to do a service, and then put it in the power of a part of the state government to keep them from doing it.

The telephone case involves substantially and in the main the same question discussed above. In addition, it appears that the city of Eminence some few years ago offered for sale for a term of 200 years the franchise to erect, maintain, and operate a telephone exchange and to do a telephone business in that city. Appellant telephone company, being an accepted bidder, bought this privilege for the price of \$50 per year, payable annually. In addition it furnishes the services of two instruments and the use of its poles for certain purposes to the city free of other charge. Under this agreement the plant of appellant was installed. It is since that agreement that the ordinance in suit was enacted. The court is of opinion that, after having sold the telephone company the privilege of putting up and operating its line and conducting its business in the town, the municipality cannot afterwards, without the consent of the telephone company, impose an additional charge for the identical privilege. This franchise sold by the city to appellant telephone company was the creature of the city. It was not only to occupy its streets, the consideration being compensation for right of way, but it was for operating its exchange in the city and receiving tolls thereat upon its business. It was that or nothing. The city could not impart to the telephone company any corporate quality. That it already had, or must get from the state. The ordinance selling the franchise by its terms went further than to grant the right to occupy the city streets and alleys. It expressly dealt with, and sold for a consideration, the privilege of doing the

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identical business within the city that it is doing. We concede that if it should be necessary, in the fair exercise of its police power by the city, to compel the telephone company to conform to some different plan of conducting its business, or even that it should be excluded altogether, if it were such a business as was deleterious to the health or safety of the citizens, the sale of the franchise would not preclude the city in the matter, for it is beyond the power of a municipality, or of the state itself, for that matter, to bargain away its police power by contract.

Wherefore the judgments are each reversed, and causes remanded for proceedings not inconsistent herewith.

PAYNTER, J., dissents.

ATLANTA & W. P. R. Co. v. ATLANTA, B. & A. R. Co.

(Supreme Court of Georgia, Nov. 9, 1905.)

[52 S. E. Rep. 320.]

Evidence—Judicial Notice.*—The courts will take judicial notice of a charter granted to a railroad company by the Secretary of State, under the general law providing for the incorporation of such companies.

Eminent Domain—Property Subject—Lands of Railroad Company—Present Use.†—A railroad company incorporated under the general railroad law may institute condemnation proceedings to acquire the property of another railroad company, if the property sought to be condemned is not in actual use for railroad purposes by the company owning the property, and is not necessary to the present needs of such company. Property acquired and held by a railroad company in anticipation of future needs, and not used and not shown to be needed for present use by such railroad company, stands upon the same footing as ordinary private property, so far as the right of another railroad company to condemn it for railroad purposes is concerned.

Same—Future Needs.†—When, in a proceeding by one railroad

*For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-note appended to *McGrew v. Missouri Pac. Ry. Co.* (Mo.), 9 R. R. R. 855, 32 Am. & Eng. R. Cas., N. S., 855; *Chicago & M. Elec. R. Co. v. Diver* (Ill.), 16 R. R. R. 346, 39 Am. & Eng. R. Cas., N. S., 346 (judicial notice will be taken that land is never assessed for taxation at its real cash market value); *Bosworth v. Union R. Co.* (R. I.), 15 R. R. R. 9, 38 Am. & Eng. R. Cas., N. S., 9 (historical facts; and existence of mob on certain day); *Mobile, etc., R. Co. v. Bromberg* (Ala.), 14 R. R. R. 823, 37 Am. & Eng. R. Cas., N. S., 823 (judicial notice of provisions of federal automatic coupler act); *Edson v. Southern Pac. R. Co.*, 12 R. R. R. 771, 35 Am. & Eng. R. Cas., N. S., 771 (judicial notice that few persons exercise the privilege of unlimited tickets, in suits by railway commissioners to compel railroad to restore an alleged lower rate between two points than the established rate with an unlimited ticket).

†For the authorities in this series on the subject of the right to condemn railroad property, see foot-note appended to *Paterson & R. R. Co. v. City of Paterson* (N. J.), 17 R. R. R. 454, 40 Am. & Eng. R. Cas., N. S., 454; *Richmond, etc., R. Co. v. Johnston* (Va.), 17 R. R. R. 420, 40 Am. & Eng. R. Cas., N. S., 420.

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company to condemn the property of another railroad company, it appears that the property sought to be condemned is not actually used by the railroad company which owns it for railroad purposes, and is not presently needed for such purposes, the right of condemnation will not be defeated merely because it appears that at some time in the future such property will be needed by such railroad company for railroad purposes. In such a case the future needs of the first company must yield to the present lawful needs of the second company.

Injunction—Condemnation Proceedings.—No sufficient reason appears for reversing the judgment refusing to grant the injunction.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by the Atlanta & West Point Railroad Company against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an application for an injunction by the Atlanta & West Point Railroad Company, hereinafter referred to as the "West Point Company," against the Atlanta, Birmingham & Atlantic Railroad Company, hereinafter referred to as the "Birmingham Company," to prevent the latter company from condemning, for use as a part of its main line, property in the city of Lagrange, Troup county, owned by the former company. The judge refused to grant the injunction, and the West Point Company excepted. It is averred in the petition that the West Point Company is one of the oldest railroads in the state, and for a period of more than half a century has operated a line of railroad from Atlanta to West Point; that it is operated in connection with the Western Railway of Alabama, which operates a line of railway from West Point to Opelika, Ala.; that the business of the company has increased from year to year, and it now does a large volume of business; that it has heretofore operated the line from Atlanta to Opelika as one division, but the local business between these points has so largely increased that it has become necessary to divide this division into two divisions, one from Atlanta to Lagrange, and the other from Lagrange to Opelika; that the creation of these two divisions will necessitate the extension of its yard and the enlargement of its terminal facilities at Lagrange, which will bring about a change of its depots, both passenger and freight, at that point; that, in anticipation of this, the company secured lands adjacent to its present property in the city of Lagrange, to be used in the enlargement of its terminals, and it has now a complete plan, as indicated by a map which is attached to the petition, which requires the use of this additional property so acquired; that while this additional property is not now actually in use, the plan contemplating its use has been perfected, and arrangements have been made to carry into effect this plan, which is absolutely essential to the proper conduct of its business as a common carrier; that the Birmingham Company is a corporation under the laws of this state, "recently

incorporated," authorized to construct a railroad from Montezuma, Ga., to Birmingham, Ala., and from Atlanta, Ga., to Wedowee, Ala., and this company has served a notice of its intention and purpose to condemn a portion of the property which the West Point Company acquired for its terminal facilities in the city of Lagrange; that the acquisition of this property is not necessary for the carrying out of the purpose for which the Birmingham Company was incorporated, and the taking of the property would seriously impair the ability of the West Point Company to discharge those duties imposed upon it under its charter as a common carrier; and that the Birmingham Company has no authority under the law to take the property of the West Point Company. The answer of the Birmingham Company sets up that the property which it seeks to condemn has never been devoted by the West Point Company to any public use, and it will not be necessary to the proper exercise of the duties imposed upon the West Point Company to use the property sought to be condemned; and it is distinctly alleged that this property can be taken without in any way impairing, embarrassing, or materially affecting the West Point Company in the transaction of any of the business which it has, or which it may reasonably expect to have in the near future. At the hearing numerous affidavits were introduced by both parties on the various questions raised by the pleadings. The bill of exceptions assigns error on the refusal to grant the injunction, and also upon a number of rulings made by the judge on the admissibility of evidence.

Dorsey, Brewster & Howell, for plaintiff in error.

J. L. Sweat, Hatton Lovejoy, and Rosser & Brandon, for defendant in error.

COBB, P. J. The charter of the Birmingham Company does not appear in the pleadings. The petition alleges that it is a corporation of this state "recently incorporated." It is well settled in this state that the courts will take judicial cognizance of the powers of a railroad company incorporated under an act of the General Assembly. The law requires the acts to be deposited in the office of the Secretary of State, and the court notices without proof the contents of all acts that are so deposited. Since the power to incorporate a railroad company has been taken away from the General Assembly and conferred upon the Secretary of State, the law requires that the application for a charter and the charter itself shall be recorded in the office of the Secretary of State. If the court can judicially notice a charter granted in an act of the General Assembly, which is merely required to be deposited in the office of the Secretary of State, we see no reason why like notice should not be taken of a charter granted under a general law, which requires the application, as well as the charter itself, to be recorded in the office of that officer. It has been held that where an act of the General Assem-

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bly requires the Governor to issue a proclamation, the court will take judicial notice of the contents of that proclamation as it appeared upon the minutes of the executive department. *Ragland v. Barringer*, 41 Ga. 114.

2. Under the general law for the incorporation of railroads, a railroad so incorporated is authorized "to acquire, purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of said road, and the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of said corporation, and to condemn, lease, or buy any land necessary for its use. * * * To cross, intersect, or join or unite its railroads with any railroad heretofore or hereafter to be constructed, at any point in its route, or upon the ground of any other railroad company, with the necessary turnouts, sidings, and switches, and other conveniences necessary in the construction of said road, and may run over any part of any railroad's right of way necessary or proper to reach its freight-depot, in any city, town or village through or near which said railroad may run, under the limitations hereinafter named; but in crossing another railroad, either over, under, at grade, level or otherwise, it shall be at the expense of the company making the crossing, and in such way and manner, at the time of construction, as not to interfere with said railroad in its regular travel or business." Civ. Code 1895, § 2167, pars. 3, 6. "In the event any company does not procure from the owner or owners thereof by contract, lease or purchase, the title to the lands or right of way or other property necessary or proper for the construction or connection of said railroad and its branches or extensions, or its depots, wharves, docks, or other necessary terminal facilities, necessary or proper for it to reach its freight or passenger depot, in any city, town or village, in the state, as hereinafter provided, said corporation may construct its railroad over any lands belonging to other persons, or over such rights of way or tracks of other railroads as aforesaid, upon paying or tendering to the owner thereof, or to his or her or its legally authorized representative, just and reasonable compensation for said lands or said right of way. When the compensation is not otherwise agreed upon, it shall be assessed and determined in the manner provided in this Code. Civ. Code 1895, § 2170. The power of condemnation conferred by the foregoing provisions of law may be exercised by a railroad company to appropriate to its use not only the property of an individual, but also the property of a corporation. The property of another railroad company may be condemned if the property thus sought to be acquired is not actually used by the other company for railroad purposes, and it will not be needed by that company for such purposes in the immediate future. Property owned by a railroad company, which it does not use for railroad purposes, and which will probably not be needed in the near future for such purposes, so far as the right of another railroad

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company seeking to condemn it is concerned, stands upon the same footing as other property not dedicated to a public use. Property so held by a railroad corporation is private property, owned for private purposes. It is not at all impressed with a public use, and is subject to be taken, under the exercise of the right of eminent domain, under the same circumstances that the property of a private individual may be so taken. Where the property is already in use for railroad purposes, or where it is manifest that it will be presently needed by the corporation to carry fully into effect the purposes of its creation, then the right of another railroad company to acquire it by condemnation is subject to restrictions which are not applicable where the property is not actually in use or needed for present use. Where property is already dedicated to a public use, it may, under the exercise of the power of eminent domain, be subjected to another use, but with the restriction that it cannot generally be so subjected if the second use either destroys or seriously impairs the first use. A condemnation having such an effect can only be had when there is expressed, unequivocal legislative authority permitting it. A general legislative authority to condemn will not be construed to give power to take, when such taking will be inconsistent with a prior public use to which the property has been dedicated. Under a general power to condemn property, a railroad company cannot condemn the property of another company, already used by it for railroad purposes, when the effect of such condemnation would be to destroy the use of the property by the former company, or to seriously impair the rights of the former company therein. *City Council v. Georgia R. Co.*, 98 Ga. 161, 26 S. E. 499. Under a general power to condemn, one railroad company cannot acquire property of another railroad company, already set apart for use as a depot or as a yard for the drilling of cars, when it is manifest that the appropriation by the second company would be either to destroy the rights of the first company, or seriously impair the first company in the use of its property for the purpose of which it was set apart. Where a company has acquired property for the purpose of enlarging its depot, or its yard, or its terminal facilities, and is presently proceeding to adapt such newly-acquired property to the use for which it was acquired, such newly-acquired property would, under such circumstances, as to the rights of another company to condemn, be fully safeguarded by the same restrictions as if the plans which were actually in progress had become completed when the condemnation proceedings were instituted. But where a railroad company, in anticipation of its future needs, acquires property, and it is not in use, and not presently needed, and it is merely held to be used in the future at such times as the needs of the company may require it, the right of condemnation exists in favor of another company, which can only be defeated by showing that the condemnation would interfere with a present necessity of the company which owned the property.

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3. The evidence authorized a finding by the judge, not only that the property sought to be condemned was not actually used by the West Point Company for railroad purposes, but that it would not be needed by it for such purposes at any time in the near future. Upon the latter point the evidence was conflicting, but the judge could find, and no doubt did find, from the evidence that the property was purchased for future use, and that the present needs of the West Point Company were not such as to require it to be used for railroad purposes. Under such circumstances, the future needs of the company must yield to the present lawful needs of the new company seeking a right of way through the city of Lagrange.

4. The bill of exceptions contains numerous assignments of error upon rulings made by the judge upon the admission and rejection of evidence, but none of these are of such material nature as to require discussion in the light of what has been said in the preceding portion of this opinion. There was no evidence to authorize a finding that the Birmingham Company had not located its line other than in good faith, for the purpose of carrying out the object of its incorporation, which was to serve the public in the most satisfactory way that a railroad corporation could render that service, and incidentally to be of such benefit from that service as is always contemplated shall flow as a compensation for the services rendered. We see no reason for reversing the judgment refusing to grant the injunction prayed. Judgment affirmed. All the Justices concurring.

STANNARD v. AURORA, E. & C. Ry. Co. et al.

(Supreme Court of Illinois, Dec. 20, 1905. Rehearing Denied April 11, 1906.)

[77 N. E. Rep. 254.]

Railroads—Interests in Land—Forfeiture.—The fact that a railroad represented, when land for a right of way was deeded to it, that it had therefore located its line of road over the land conveyed and would do certain things in the future, and subsequently abandoned the proposed route, is not ground for cancellation of the deed, in the absence of anything to show that such representations were false when made.

Pleading—Legal Conclusions.—In the absence of an allegation of acts of a railroad manifesting an abandonment of its right of way, an allegation that it had abandoned a portion of its right of way at a certain time is a mere conclusion of the pleader, and is bad.

Railroads—Right of Way—Abandonment—Intention.*—In order to constitute an abandonment by a railroad of a part of its right of way, an intention to abandon the right of way must coexist with nonuser.

*For the authorities in this series on the question, what constitutes an abandonment of a railroad right of way, see foot-note appended to *Canton Co. v. Baltimore & O. R. Co.* (Md.), 13 R. R. R. 708, 36 Am. & Eng. R. Cas., N. S., 708.

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Evidence—Parol—Invalidating Deed.—A deed acknowledging the payment of consideration cannot be contradicted by parol. for the purpose of invalidating the deed or impairing its legal effect.

Quieting Title—Pleading—Allegation Showing Possession.—A bill to cancel a deed as a cloud on title is bad, where it alleges that the grantee is in possession of part of the premises covered by the deed.

Appeal from Circuit Court, Cook County; Oscar E. Heard, Judge.

Suit by Charles C. Stannard against the Aurora, Elgin & Chicago Railway Company and others. From a decree dismissing the bill for want of equity, complainant appeals. Affirmed.

Thatcher, Griffen & Wright, for appellant.

Hopkins, Peffers & Hopkins and *Moran, Mayer & Meyer*, for appellees.

SCOTT, J. The material allegations of the bill of complaint in this case are: That appellant, on September 7, 1899, was the owner of certain premises in Cook county, and that on that day the Aurora, Wheaton & Chicago Railway Company, by its agents, made certain representations to the appellant (which will be set forth hereinafter), and that the appellant, relying on these representations and believing them to be true, was thereby induced to execute, and did execute, a deed to the said railway company conveying to that company the right to perpetually and exclusively use and occupy for railroad purposes, with the right of necessary slope, a strip of land 75 feet wide at the approach to the river and 50 feet wide on the high land, extending in an easterly and westerly direction across the said premises. a copy of the said deed being attached to the bill as an exhibit; that on or about May 1, 1900, the said railway company, by its agents, represented to appellant that it was necessary for its right of way that the company should have a strip of land 66 feet wide at all points along the same line theretofore conveyed to the company, where the strip as theretofore conveyed was only 50 feet wide as and for the said right of way, which should be a part of the main line of the said railroad, a copy of this deed being attached to the bill as an exhibit: that no consideration was given or received for the said conveyances; that about the month of September, 1900, the said railway company abandoned the said route for its said line of railway, and refused to construct its railway on said strips of land, and has neglected to operate its cars on the said right of way, whereby the appellant has received no benefit or advantage to his remaining property, as contemplated and promised at and before the time of making the said deeds; that after the making and recording of the said deeds the name of the said railway company was changed to that of the appellee the Aurora, Elgin & Chicago Railway Company; that the Aurora, Wheaton & Chicago Railway Company executed a trust deed to the appellee the American Trust & Savings Bank of Chicago, Ill., to secure bonds aggregat-

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ing \$3,000,000, covering the said strips of land, which trust deed was dated April 15, 1901, and was recorded on February 14, 1904, and that on September 1, 1903, the Aurora, Elgin & Chicago Railway Company made and executed a trust deed to the appellee Albert J. Hopkins, as trustee, to secure bonds aggregating \$500,000, covering the said strips of land, which trust deed was recorded on January 20, 1904; that the appellant is not informed as to who is the holder and owner of the said bonds; that since September 7, 1899, appellant has been in the continuous possession of the said strips of land, except the part thereof which is 75 feet wide, which said part the Aurora, Wheaton & Chicago Railway Company has occupied since the month of May, 1901, and except that the Forest Home Cemetery Company has occupied a certain other portion of the said strips, under authority of appellant, since about the middle of January, 1902, and that the records of the said deeds and trust deeds are clouds on appellant's title. The prayer of the bill is that the said two deeds be canceled and annulled, and the records thereof removed as clouds upon appellant's title, and that the record of the said trust deed may be also removed as clouds upon his title. The Aurora, Elgin & Chicago Railway Company, the American Trust & Savings Bank, and Albert J. Hopkins, defendants, filed general and special demurrers to the bill, which demurrers were sustained. The appellant elected to stand by his bill, and the same was thereupon dismissed for want of equity. These rulings of the court are assigned for error.

It is contended by the appellant that the allegations of the bill are such as to entitle him to the relief prayed for on the ground of fraudulent representations as an inducement to the execution of the deeds. The representations alleged are: that the agents of the Aurora, Wheaton & Chicago Railway Company, on September 7, 1899, represented to the appellant that the main line of its railway running from the city of Chicago to the city of Wheaton and the city of Aurora had heretofore been located along a certain line over appellant's premises; that the railway company was about to construct a superior kind of electric railroad to carry passengers and express matter only, and especially to carry suburban residents to and from the city of Chicago, whereby the owners of land adjoining the said railway would receive great benefit and advantage from the operation thereof; that a passenger depot would be located at the cross-street known as First avenue, on the said main line, about midway east and west of appellant's said premises; and that the said right of way was to be a part of the main line of the railroad. Only one of these representations—that is, the first—relates to an existing fact, and there is no allegation in the bill that this alleged fact was not true. The other representations relate to what the railway company intended to do in the future. The allegations are that the railway company "was about to construct," that a "passenger depot would be located," and that the "right of way was to be a

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part of the main line," no one of which representations was the statement of an existing fact. The allegation that the owners of the land adjoining the railway would be benefited by the operation thereof was a statement of a mere matter of opinion, and not the representation of a fact. It is not alleged that any one of these representations was false or fraudulently made. It is, indeed, alleged that the Aurora, Wheaton & Chicago Railway Company, about the month of September, 1900, abandoned said route for its line of railway, and refused to construct its railway on the strips of land deeded to it by appellant, and has neglected to operate its cars on the said right of way, and that for these reasons the appellant has received no benefit to his remaining property, as contemplated and promised as aforesaid. Conceding these allegations to be true, there is nothing in them to show that the representation as to the location of the road was false, or that it was not the intention of the railway company in good faith, when the representations were made, to do the things then mentioned and contemplated. Such being the case, the bill wholly fails to show any right to the relief prayed for on the ground of fraud or false and fraudulent representations. *Gage v. Lewis*, 68 Ill. 604; *Day v. Fort Scott Investment Co.*, 153 Ill. 293, 38 N. E. 567; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Commercial Mutual Accident Co. v. Bates*, 176 Ill. 194, 52 N. E. 49; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796.

Nor does the bill set forth facts showing an abandonment of the route in question, but alleges the same merely as a conclusion of the pleader. It is not alleged that the railway company has constructed its railroad on other strips of land, or has acquired another right of way, or has done other acts from which an abandonment might be inferred. The bill shows that the company is in possession of that part of the strips conveyed which is 75 feet wide, and has never had possession of the remainder of the tract conveyed, but that the appellant, and the cemetery company by his authority, have had the possession of the remainder thereof. The bill shows that the railway company, by its original name, and also by its present name, has executed trust deeds covering the whole of the strips in controversy; the second trust deed being dated September 1, 1903, and both trust deeds having been recorded in the early part of the year 1904. These facts are inconsistent with the idea of an abandonment, and, instead of aiding the conclusion alleged, have a tendency to contradict the conclusion. To constitute an abandonment by a railway company of any part of its right of way, there must not only be nonuser, but an intention to abandon the same. *Durfee v. Peoria, Decatur & Evansville Railway Co.*, 140 Ill. 435, 30 N. E. 686; *Chicago & Eastern Illinois Railroad Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223. While, in the latter of these two cases, it was held to be proper to leave it for the jury to say, in view of the facts and circumstances of the case, whether there was an intention to abandon, the law, as announced in the first of these two cases,

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was reaffirmed, and it was said that nonuser for a definite period is not of itself sufficient to establish an abandonment.

It is urged, however, that the naked allegation that the railroad company abandoned the said route is an allegation of fact, and not of a conclusion, and is sufficient as a matter of pleading. The allegation is that the Aurora, Wheaton & Chicago Railway Company, about the month of September, 1900, abandoned the said route for its line of railway. The time is definitely stated as being in a certain month and a certain year. It is not an abandonment arising from lapse of time, with other facts and circumstances, but an abandonment at a definite time, which could only be manifested by acts, and no acts are alleged, except the statement that the railway company, in the same month and year, refused to construct its railroad on the said strips of land. It is the law that legal conclusions should not be pleaded, and that a pleading is bad, if it contains nothing more than a bare averment of a legal conclusion. 12 Ency. of Pl. & Pr. 1020, 1021. It is not sufficient to plead the conclusion that there is a failure of consideration; or that a change took place in the title of the property insured by voluntary transfer, although this is a traverse of the language of the insurance policy; or that an official bond was good and sufficient; or that a good bond was tendered by one seeking license to keep a dramshop; or that no sufficient notice of the application for the confirmation of an assessment was given. *Parks v. Holmes*, 22 Ill. 522; *Clay Fire and Marine Ins. Co. v. Wusterhausen*, 75 Ill. 285; *Kilgore v. Ferguson*, 77 Ill. 213; *People v. Village of Crotty*, 93 Ill. 180; *Kedzie v. West Chicago Park Com'rs*, 114 Ill. 280, 2 N. E. 182; *Daggitt v. Mensch*, 141 Ill. 395, 31 N. E. 153. A demurrer to a pleading admits the truth of the facts well pleaded, but not the conclusions sought to be drawn from them, as, in a bill alleging that a certain transaction was a mortgage, that allegation is but an inference from the facts stated, and is not admitted by a demurrer to the bill. *Greig v. Russell*, 115 Ill. 483, 4 N. E. 780. In the case at bar the allegation that the railway company, about the month of September, 1900, abandoned the said route and refused to construct its said railway on the said strips, presents an issue involving both questions of fact and law which could not be submitted to a jury, and for this reason the demurrers were properly sustained. *Clay Fire & Marine Ins. Co. v. Wusterhausen*, *supra*.

It is further insisted by appellant that the bill shows that there was no consideration for the deeds, and that for this reason the demurrers should have been overruled. The bill does allege that no consideration was given or received for the said conveyances, but each of the instruments, copies of which are made part of the bill, recites a consideration; the first a consideration of \$1 paid to appellant, and the second a consideration of \$1 and other good and valuable considerations, the receipt of which is duly acknowledged. It will be noticed that the allegation of the bill is not that the consideration has failed, but that no considera-

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tion whatever was given or received for the conveyances. While the recital of the payment of the consideration in a deed may be contradicted for certain purposes, yet such acknowledgment of payment cannot be contradicted by parol for the purpose of wholly invalidating the deed or impairing its legal effect as a conveyance. *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Morris v. Tillson*, 81 Ill. 607; *Sterricker v. McBride*, 157 Ill. 70, 41 N. E. 744. Furthermore, the manifest object of the bill is to annul the deeds and to remove these and the trust deeds as clouds from appellant's title. No sufficient equitable consideration is shown to take this case out of the general rule that in a bill to remove a cloud from title it must not only be alleged that the complainant is the owner of the premises, but also, either that the complainant is in the possession of the premises at the time of filing the bill or that the premises are vacant and unoccupied when the bill is filed. *Glos v. Miller*, 213 Ill. 22, 72 N. E. 714; *Glos v. Archer*, 214 Ill. 74, 73 N. E. 382. The bill in this case alleges that the railway company is in possession of part of the premises covered by the deeds, and asks to have the cloud of the deeds and trust deeds removed from all the premises, thus showing upon its face that the complainant is not entitled to the relief sought.

The decree of the circuit court is affirmed.

Decree affirmed.

UNION REFRIGERATOR TRANSIT COMPANY, Plff. in Err., v. COMMONWEALTH OF KENTUCKY.

(Argued October 13, 16, 1905. Decided November 13, 1905.)

[26 Sup. Ct. Rep. 36.]

Constitutional Law—Due Process of Law—State Taxation of Tangible Personal Property in Other States.*—Due process of law is denied a Kentucky corporation by a tax assessed under the authority of Ky. Stat. § 4020, upon its rolling stock permanently located in other states and employed there in the prosecution of its business.

In error to the Court of Appeals of the Commonwealth of Kentucky to review a judgment which, reversing the judgment of the Jefferson Circuit Court, sustained an assessment on the

*For the authorities in this series on the right to tax the rolling stock of railroad corporations as affected by the fact that it is, or is not, within the state imposing the tax, see foot-note appended to *State v. Union Tank Line Co.* (Minn.), 17 R. R. R. 682, 40 Am. & Eng. R. Cas., N. S., 682 (right of a state to tax cars, used in interstate commerce, temporarily within its borders); *People v. Knight* (N. Y.), 6 R. R. R. 547, 29 Am. & Eng. R. Cas., N. S., 547 (the value of the rolling stock of a domestic railroad corporation is capital stock employed within the state unless such stock is used exclusively outside of the state); note, 13 Am. & Eng. R. Cas., N. S., 874 (cars of foreign corporation).

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rolling stock of a Kentucky corporation permanently located in other states and employed there in the prosecution of its business. Reversed and remanded for further proceedings.

See same case below, 26 Ky. L. Rep. 23, 80 S. W. 490.

Statement by MR. JUSTICE BROWN.

This proceeding was begun by a statement filed by the revenue agent of the commonwealth in the Jefferson county court, praying that certain personal property belonging to the plaintiff in error be assessed for taxation for state, county, and municipal taxes, and be also adjudged to pay a penalty of 20 per cent. on the aggregate amount of the tax.

To this statement the transit company filed certain demurrers and answers, upon which, and upon the deposition of the comptroller of the company in St. Louis, Missouri, the case went to a hearing, and resulted in a finding of facts that the transit company was the owner of 2,000 cars in September, 1897, 1898, 1899, and 1900, to which years the recovery was limited, of the value of \$200 each; that its cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list such a proportion of its cars as, under a system of averages upon their gross earnings, were shown to be used in the state of Kentucky during the fiscal year, the court finding by this method that there were subject to assessment in Kentucky 28 cars for the year 1897, 29 for the year 1898, 40 for the year 1899, and 67 for 1900.

The court also found that the cars other than those mentioned were not liable to assessment.

The order of the county court was affirmed by the circuit court, and an appeal taken to the court of appeals of Kentucky, which reversed the judgment of the court below, and found that the company was liable to taxation upon its entire number of 2,000 cars, and directed the court below to enter judgment against it for the taxes appropriate to this number. 26 Ky. L. Rep. 23, 80 S. W. 490.

To review this judgment this writ of error was sued out.

William H. Field and Alexander Pope Humphrey for plaintiff in error.

Henry L. Stone, Samuel B. Kirby, and Robert W. Bingham for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court:

In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other states, and employed there in the prosecution of its business.

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Such taxation is charged to be a violation of the due process of law clause of the 14th Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the transit company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the state, which was determined by the proportion which the number of miles of the railroad in the state bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. *Northern C. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490-499, 22 L. ed. 189-193; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 679, 17 Sup. Ct. Rep. 581, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the 14th Amendment. See also, *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the

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amount of his property subject to taxation, and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation. As said by Adam Smith in his *Wealth of Nations*, Book V. chap. 2, pt. 2, p. 371: "The subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly v. Pittsburg*, 104 U. S. 78, 26 L. ed. 658; *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. Subject to these individual exceptions, the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has

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been defended by any court. It is said by this court in the *State Tax on Foreign-held Bonds Case*, 15 Wall. 300-319, 21 L. ed. 179-187, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As was said in *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385-396, 47 L. ed. 513-518, 23 Sup. Ct. Rep. 463: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government,—namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also, *M'Culloch v. Maryland*, 4 Wheat. 316-429, 4 L. ed. 579-607; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596-599, 15 L. ed. 254, 255; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 429, 431, 20 L. ed. 192, 194, 195; *Morgan v. Parham*, 16 Wall. 471-476, 21 L. ed. 303, 304.

Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Bonaparte v. Appeal Tax Court*, 104 U. S. 592, 26 L. ed. 845; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute

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equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock, and the like,—the securities themselves.

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation as its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a state other than that of its owner, is taxable there. *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Western U. Teleg. Co. v. Atty. Gen.*, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686. We have also held that, if a corporation be engaged in running railroad cars into, through, and out of the state, and having at all times a large number of cars within the state, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 676.

There are doubtless cases in the state reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicil of the owner; but upon examination they all, or nearly all, relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this rule to tangible property, and, after a careful examination, have not been able to find any wherein the question is squarely presented, unless it be that of *Wheaton v. Mickel*, 63 N. J. L. 525, 42 Atl. 843, where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there.

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The case turned upon the construction of a state statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner. The cases in the state reports upon this subject usually turn upon the construction of local statutes granting or withholding the right to tax extraterritorial property, and do not involve the constitutional principle here invoked. Many of them, such, for instance, as *Blood v. Sayre*, 17 Vt. 609; *Preston v. Boston*, 12 Pick. 12; *Pease v. Whitney*, 8 Mass. 93; *Gray v. Kettell*, 12 Mass. 161, turn upon the taxability of property where the owner is located in one, and the property in another, of two jurisdictions within the same state, sometimes even involving double taxation, and are not in point here.

One of the most valuable of the state cases is that of *People ex rel. Hoyt v. Tax & A. Comrs*, 23 N. Y. 224, where, under the New York statute, it was held that the tangible property of a resident, actually situated in another state or county, was not to be included in the assessment against him. The statute declared that "all lands and all personal estate within this state" were liable for taxation, and it was said in a most instructive opinion by Chief Judge Comstock that the language could not be obscured by the introduction of a legal fiction about the situs of personal estate. It was said that this fiction involved the necessary consequence that "goods and chattels actually within this state are not here in any legal sense, or for any legal purpose, if the owner resides abroad;" and that the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim "*in fictione juris semper æquitas existit.*" See *Eidman v. Martinez*, 184 U. S. 581, 46 L. ed. 700, 22 Sup. Ct. Rep. 515; *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law." [3 Bl. Com. 43.] The opinion argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the state where it is located. Similar cases to the same effect are *People ex rel. Jefferson v. Smith*, 88 N. Y. 585; *New Albany v. Meekin*, 3 Ind. 481, 56 Am. Dec. 522; *Wilkey v. Pekin*, 19 Ill. 160; *Johnson v. Lexington*, 14 B. Mon. 648; *Catlin v. Hull*, 21 Vt. 152; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

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In *Weaver v. State*, 110 Iowa 328, 81 N. W. 603, it was held by the supreme court of Iowa that a herd of cattle within the state of Missouri, belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease. In *Com. v. American Dredging Co.*, 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained, outside of the state. It was said that the nontaxability of tangible personal property located permanently outside of the state was not "because of the technical principle that the situs of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages, and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another state. In such cases it is taxable within the jurisdiction where found, and is exempt at the domicil of the owner." The property in that case, however, was held not to be permanently outside of the state, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania, that so much of the tangible property of a corporation as is situated in another state, and there employed in its corporate business, is not taxable in Pennsylvania. *Com. v. Montgomery Lead & Zinc Min. Co.*, 5 Pa. Co. Ct. 89; *Com. v. Delaware, L. & W. R. Co.*, 145 Pa. 96, 22 Atl. 157; *Com. v. Westinghouse Electric Mfg. Co.*, 151 Pa. 265, 24 Atl. 1107, 1111; *Com. v. Standard Oil Co.*, 101 Pa. 119. The rule is the same in New York. *People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.*, 46 How. Pr. 315.

But there are two recent cases in this court which we think completely cover the question under consideration, and require the reversal of the judgment of the state court. The first of these is that of the *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the state of Indiana. We held that the fact that such franchise had been granted by the commonwealth of Kentucky did not bring within the jurisdiction of Kentucky, for the purpose of taxation, the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament, derived from and having its legal situs in that state. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the 14th Amendment; as much so as if the state taxed the land owned by that company; and that the officers of the state had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for

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the transportation of persons and property across the river both ways."

The other and more recent case is that of the Delaware. L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669. That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there awaiting sale, and beyond the jurisdiction of the commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed, in the state where it rested for the purpose of sale at the time when the appraisement in question was made. Both this court and the supreme court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation issuing such stock. The two courts agreed in the general proposition that tangible property permanently outside of the state, and having no situs within the state, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the state. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign states for purposes of taxation, and, in truth, it was there taxed. We regard this tax as, in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration require, as the tax was not upon the personal property itself, but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which we held should have been deducted.

The adoption of a general rule that tangible personal property in other states may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other states or even in foreign countries, of stocks of goods and merchandise kept at branch establishments, when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations, which might be taxed in the state where they are incorporated, though their charter contemplated the construction and operation of roads wholly outside the state, and sometimes across the continent; and when, in no other particular, they are subject to its laws and entitled to its protection. The property of such incorporations, where no business is done within the state, is open to grave doubt; but it is possible that legislation alone can furnish a remedy.

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Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz., whether the transit company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same estate, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE HOLMES:

It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the 14th Amendment; and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

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(Court of Appeals of Maryland, Dec. 7, 1905.)

[62 Atl. Rep. 572.]

Injunction—Primary Relief—Bill—Dismissal.—Where an injunction asked for is the primary relief demanded, and not merely ancillary, and on hearing an application to dissolve a temporary injunction it is determined that plaintiff is not entitled to injunctive relief, it is proper for the court to dismiss the bill on the merits.

Nuisance—Injunction—Bill.—Where a bill sought to restrain the construction of a switch track along a county road in front of plaintiff's premises, charging that the construction, use, and operation of the siding would greatly depreciate the value of plaintiff's property as a residence by reason of the noise and danger incident to the operation of steam cars, and alleged that the smoke, noise, and dust arising from the use of locomotives would constitute a nuisance to plaintiff individually, as well as to the public, and would inflict irreparable injury on plaintiff, but failed to allege the proximity of the railroad to plaintiff's dwelling house, or in what way the value of the latter could or would be affected by the construction of the switch, or how the comfort and enjoyment thereof would be interfered with, or any facts showing how the use of the railroad, the smoke, and noise would operate injuriously thereon, the bill was insufficient to justify an injunction.

Same—Railroad Switches.*—A railroad switch or siding is not a

*See foot-note appended to *Walther v. Chicago & W. I. R. Co.* (Ill.), 17 R. R. R. 456, 40 Am. & Eng. R. Cas., N. S., 456; *Connors v. Yazoo & M. V. R. Co.* (Miss.), 17 R. R. R. 455, 40 Am. & Eng. R. Cas., N. S., 455; foot-notes appended to *Perrine v. Pennsylvania R. Co.* (N. J.), 17 R. R. R. 450, 40 Am. & Eng. R. Cas., N. S., 450; *John-*

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nuisance per se, and can only become such by circumstances connected with its construction, location, or the manner of its use.

Same — Public Nuisance — Private Injury.* — Where complainant sought to enjoin the construction of a railroad switch along a county road, alleging that the maintenance of the switch would interfere with and endanger the use of the road, which was her only exit from her premises, but it was not contended that there was any actual obstruction of the road by the switch, complainant's safety and comfort in using the road only being impaired, her injury, if any, was not different in kind from that suffered by the general public having occasion to use the road, and hence she was not entitled to sue to enjoin the maintenance of the switch.

Same—Parties.—Where a railroad company agreed to construct a switch at the expense of a gravel company, the latter being the party having the substantial interest involved and most responsible for the construction of the switch, and being the directing agency in such construction, the railroad company, though a proper party to a suit by an adjoining property owner to restrain such construction, was not a necessary party.

Pleading—Verification of Answer.—Where, in a suit to restrain the construction of a switch by a railroad company for the benefit of a certain sand and gravel company, the latter was the substantial agency having the matter of construction in charge, it was no objection to the answer of the railroad company that the facts therein were verified by one of the officers of the gravel company who had knowledge thereof.

Same—Evidence.*—Where, in a suit by an adjoining property owner to restrain the construction of a railroad switch along a county road near her property as a nuisance, there was no evidence showing any diminution in value of plaintiff's property because of the switch, nor to show how noise and smoke from locomotives using the switch could affect the enjoyment of plaintiff's property, nor the probable quantity of such noise and smoke, or what inconvenience would be occasioned thereby, the evidence was insufficient to justify an injunction.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Action by Nannie E. Davis against the Baltimore & Ohio Railroad Company and others. From a decree dissolving an injunction and dismissing the bill, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Clayton E. Emig, for appellant.

Robert W. Wells and *Marion Duckett*, for appellees.

Jas. A. C. Bond, for the Baltimore & Ohio Railroad Company.

JONES, J. This is an appeal from a decree of the circuit court for Prince George's county dissolving an injunction which had

son v. Charleston & W. C. Ry. (S. Car.), 17 R. R. R. 447, 40 Am. & Eng. R. Cas., N. S., 447; Atchison, etc., Ry. Co. v. Armstrong (Kan.), 17 R. R. R. 415, 40 Am. & Eng. R. Cas., N. S., 415; Morris v. Montgomery Traction Co. (Ala.), 17 R. R. R. 413, 40 Am. & Eng. R. Cas., N. S., 413; Davis v. Charleston & W. C. Ry. Co. (S. Car.), 17 R. R. R. 102, 40 Am. & Eng. R. Cas., N. S., 102; Foust v. Pennsylvania R. Co. (Pa.), 17 R. R. R. 156, 40 Am. & Eng. R. Cas., N. S., 156.

*See foot-note on preceding page.

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been granted in the cause and dismissing the bill of complaint upon which the suit had been instituted. The bill alleges that the plaintiff is the owner of a tract of land at or near Contee Station, on the main line of the Baltimore & Ohio Railroad Company, upon which she has expended more than the sum of \$20,000 "for improvements upon the dwelling erected on said premises, and was about to erect yet larger improvements thereon, all of which enures to the benefit of said county and the taxes collectible therefrom, * * * that she is the owner of valuable horses which she uses daily on said premises and on the county road bordering on said premises, and that she has no exit to drive from said premises other than by said county road; that the defendants [appellants here] Charles Hillers and Albert Taylor are the reputed owners of a tract of land adjoining the said premises along the center of the said county road, running northerly from the intersection of said railroad." Then, after alleging that the plaintiff "is informed and believes" that the Baltimore & Ohio Railroad Company "is about to construct, for the use and benefit of said Charles Hillers and Albert Taylor, a railroad track or siding intersecting with the Baltimore & Ohio Railroad track extending northerly immediately along the county road and along the premises" of the plaintiff (appellant here) "for the purpose of operating steam cars" thereon, the bill charges "that the construction, use, and operation of said railroad track or siding will greatly depreciate the value of her property as a residence, by reason of the noise and danger incident to the operation of said steam cars and locomotives passing immediately in front of her residence;" that the use aforesaid will imperil the life of "the plaintiff" and other members of her family while lawfully engaged in driving upon said county road; that the smoke, noise, and dust arising from the use of locomotives on said railroad in transporting sand and other materials from and to its terminus will constitute a nuisance to "the plaintiff" individually, as well as to the public using said county road, and inflict an irreparable injury; that the construction, use, and operation of said siding and said steam cars constitute a public, as well as a private, nuisance in frightening horses belonging to users of said county road; that the said siding has been graded by the defendants Hillers and Taylor "under a contract with the Baltimore & Ohio Railroad, which" agrees to lay the ties and tracks upon said roadbed; that "all of said grading is now ready" for the laying of the tracks upon said roadbed; "that the use and operation of said steam cars on said siding will greatly endanger the use of said county road by those who reside in the immediate vicinity and the public at large; that it will tend to inflict injury by continuously frightening horses and decrease the travel of said county road and greatly depreciate the value" of the plaintiff's "property and premises." Upon these allegations the bill prayed that the defendants therein named be enjoined from constructing the railroad or siding of which complaint was made, and from laying

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tracks on the roadbed graded as set out in the bill, "adjoining the county road or elsewhere in the near vicinity of said county road or the property" of the plaintiff (appellant), and "from operating or in any manner constructing said railroad or siding along said county road or the premises" of the plaintiff. A preliminary injunction was granted upon the filing of the bill. The defendants filed their answers. The Baltimore & Ohio Railroad Company its separate answer, and Charles Hillers and Albert Taylor their joint answer (in which the Contee Sand & Gravel Company united and asked to be allowed to intervene in the suit), and accompanied their answers with a motion to dissolve the injunction. A hearing of this motion upon the bill, answers, and testimony resulted in the decree dissolving the injunction and dismissing the bill, from which this appeal was taken.

The appellant contends that the injunction should have been continued; and further insists that, whether the injunction was continued or not, the bill should not have been dismissed at that stage of the proceedings. In this case no other relief was sought by the bill than the injunction to restrain the defendants from the acts complained of; and no other relief, under the general prayer for relief, could have been granted consistently with that specifically prayed for. It is now well settled in our practice that "where the injunction asked for is not ancillary, but the primary and principal relief prayed for, there is no reason for retaining the bill, if upon hearing, upon bill and answer, or bill, answer, and depositions, it appears to the court, there is no ground for issuing or granting the injunction upon the merits." *Kelly, Piet & Co. v. Baltimore*, 53 Md. 134. Upon the case presented to the court below we are of opinion that the injunction which had been granted therein ought to have been dissolved, and that it was proper to dismiss the bill. That court in its opinion, filed with the decree, said the injunction had been improvidently granted, and with this we agree. The allegations of the bill were altogether too general and indefinite to authorize the granting of the injunction. The suit of the appellant was designed to restrain what was charged in the bill to be a threatened nuisance. In *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, this court said, through Judge Alvey: "To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented, a court of chancery does not interfere. It must appear to be a case of real injury, and where a court of law would award substantial damages." The principle applied in the case referred to is clearly applicable here, where the gravamen of the bill is that the acts of the defendants complained of will interfere with the use and enjoyment of the premises occupied and owned by the appellant, and will greatly depreciate the value thereof. The bill in the case just referred

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to was brought to restrain the erection of a factory designed for a use which it was charged would be a nuisance to the plaintiffs, in that it would destroy the comfort and enjoyment of their property and result in irreparable and continuing injury thereto and to the value thereof. . The court further said, after referring to the allegations of the bill as being very strong as to what would be the consequences to result from the erection of the factory: "It is not enough for the parties complaining simply to allege that particular consequences will follow the erection of the factory, that may be their opinion or apprehension, but facts must be stated so that the court can see and determine whether the allegation is well founded." The court then points out the defects in the bill thereunder reviewed, and the same defects are manifest in the bill in the case at bar. The proximity of the railroad, the alleged nuisance in this case, to the dwelling and improvements referred to in the bill, is not shown; nor does it appear in what way the value of these can be, or will be, affected by its construction or the comfort and enjoyment of them will be interfered with. There is nothing but the broad assertion that the results mentioned will follow its construction. There is no allegation of whether the use of the railroad will be frequent or otherwise, nor what smoke and noise it is likely to occasion in its use, nor in what way such smoke and noise will operate injuriously upon the value of the appellant's property or seriously diminish or interfere with the comfort and enjoyment of its use. The nearest approach to determining the character of the railroad as a nuisance, when it shall be constructed and put into operation, is its alleged proximity to the public road mentioned in the bill. If this circumstance makes it a nuisance at all, it is or will become a public nuisance from which the appellant must suffer some peculiar and special injury, different in kind from that which will be occasioned to the general public to entitle her to maintain a private action. *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Schall v. Nusbaum*, 56 Md. 512; *Garitee v. Baltimore*, 53 Md. 422; *Crook v. Pitcher*, 61 Md. 510. The bill alleges the appellant has no exit to drive from her premises other than over the county road, the use of which will be interfered with and endangered by the construction of the railroad in question. Be this as it may, there is no actual obstruction of this county road. It is not pretended it cannot be used at all, but only that the safety and comfort of using it will be impaired, and in the use of it the appellant will encounter the same inconvenience in kind that will be suffered by others of the general public having occasion to use it. A railroad switch or siding is not a nuisance per se. It can only become such by circumstances connected with its construction or location, or the manner of its use after being constructed. It comes, therefore, within the "general rule that where the thing complained of is not a nuisance per se, but may become so according to circumstances, and the injury apprehended is eventual or contingent, equity will

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not interfere. The presumption is that a person entering into a legitimate business will conduct it in a proper way so that it will not constitute a nuisance." 14 Encyc. of Plead. & Prac. 1128, 1129. Accordingly, to have entitled the appellant here to the preliminary injunction to restrain what was alleged to be a threatened nuisance, the bill in its allegations should have set out the facts and circumstances, if any existed, which, when supported by proof, would constitute substantial grounds for the charges in the bill of a threatened nuisance. The appellant filed exceptions to the answers of the appellee in the court below, which that court could properly have heard and considered at the time of hearing the motion to dissolve the injunction. Alex. Ch. Prac. 87; *Keighler et al. v. Savage Manfg. Co.*, 12 Md. 383, 71 Am. Dec. 600. It does not appear from the record that these exceptions were there noticed.

It was urged as grounds for the exceptions that the answers of the Baltimore & Ohio Railroad Company and Charles Hillers were not accompanied with affidavits, and therefore could not be considered, that the answers were not responsive to the bill, and that they were evasive and insufficient. We do not find that the answers are obnoxious to the objections of not being responsive to the bill and of being vague and insufficient. They in terms deny that the appellant would be interfered with in the use of her property and premises by the proposed switch or siding. Explain how the said switch or siding is to be constructed and operated, and the objects of its construction. They are responsive to the allegations of the bill, and contain a sufficient denial of the equity it attempts to set up. In respect to the want of affidavits to the answers, there is no doubt that as a general rule to authorize the dissolution of an injunction when the same is heard upon a motion to dissolve that all of the defendants must have answered the bill; and, to authorize effect to be given to the answers of the defendants, the same must be under oath. They are, however, well-recognized exceptions to the rule requiring the answers of all who may have been made parties defendant to be filed before entertaining the motion to dissolve. In *Heck v. Vollmer et al.*, 29 Md. 507, it was held that this rule was "subject to discretion and modification, according to the circumstances of the case, as, where those not answering are mere formal parties, or are infants or nonresidents, and whose answers cannot be material in regard to the facts on which the injunction is founded, there the answers of such parties will not be required as a prerequisite to hearing the motion." Now in this case, though it was not improper to make the Baltimore & Ohio Railroad Company a party to the appellant's bill, such company was not an indispensable party. The object of the suit could have been accomplished by a proceeding against the other parties without making that corporation a party defendant. The party having the substantial interest involved and the party most responsible for the acts complained of in appellant's bill was the

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Contee Sand & Gravel Company, acting through its agents and employees, Taylor and Hillers. Taylor was its president and the directing agency in the matter of the construction of the switch or siding in question. He was the one most familiar with all the facts. He swore to the answer filed by himself and Hillers, and in so doing virtually made oath to the facts stated in the answer of the Baltimore & Ohio Railroad Company, which in substance and effect was identical with that to which his affidavit was appended. It was requisite, if an affidavit was to be appended to the answer of the railroad company that some one should make the affidavit on its behalf, and no one could have done this with better knowledge of the truth of the facts and averments it set out and contained than Taylor, who swore to the practically identical answer of himself and Hillers. We think under the circumstances of this case the answers of Hillers and the railroad company may well be brought within the exceptions to the rule, invoked against their being allowed effect, which have been recognized in practice, as we have seen.

Coming, now, to the consideration of the testimony upon which the motion to dissolve was heard, this was equally as vague and indefinite as the allegations of the appellant's bill. There is no testimony at all showing any diminution in value, present or prospective, of appellant's property. There is none as to how the noise and smoke will or can affect the appellant in the enjoyment of her property. None to show the probable quantity of such noise and smoke or what inconvenience is to be occasioned by it. As to the danger to result from the operation of the switch or siding in question, there is no evidence, except the expression of opinion, in a general way, by two of the witnesses that there will be danger at certain points on the public road likely to be encountered by persons using the road, a danger or inconvenience, if it results as indicated, not peculiar to the appellant, but which will be suffered by the public generally. There is testimony going to show some flooding upon one occasion of the lands of the appellant by reason of obstruction to the flow of the water by the partly constructed switch. This consequence of the acts complained of was not alluded to in appellant's bill, and is not shown to be a continuing or recurring condition, nor any thing more than an exceptional and extraordinary occurrence readily susceptible of being compensated for in damages in an action at law, if actionable injury was suffered therefrom.

Upon the whole case we find the injunction was properly dissolved and that there was no reason shown for retaining the bill, and the decree in the case will be affirmed, with costs.

Decree affirmed, with costs to the appellees.

GOSSETT *et al.* v. SOUTHERN RY. CO. *et al.* (three cases).

(Supreme Court of Tennessee, Oct. 13, 1905.)

[89 S. W. Rep. 737.]

Eminent Domain—Railroads—Construction—Injuries to Adjoining Property—Liability.*—In an action against a railroad company for injuries to an adjoining property owner by the construction of the road opposite his property, it was error to charge that, the work being authorized by law, defendant was only liable for its negligent prosecution; the railroad's power to construct its road being a mere privilege, which did not exempt it from responsibility for injuries to private rights, whether resulting from negligence or otherwise.

Same—Elements of Damage—Noise.*—An adjoining property owner is entitled to recover against a railroad company damages sustained by the noise and discomfort resulting from blasting operations incident to the construction of the road near his property.

Same—Inconvenience and Annoyance.*—In an action against a railroad company for damages sustained to occupants of adjoining property by blasting operations incident to construction, no recovery could be had for mere loss of sleep, discomfort, and inconvenience not resulting in physical injury or impairment of health.

Same—Injury to the Use—Nuisance—Questions for Jury.—Where, in an action against a railroad company for injuries to adjoining property resulting from blasting operations incident to construction, it was not claimed that there was any permanent damages to the freehold, but plaintiff alleged that he was driven from his home by the blasting and other operations carried on by defendants, and the usable value of his home was impaired, etc., whether the injuries complained of amounted to a nuisance, and whether the rental value of the property in question was destroyed or temporarily lessened, was for the jury.

Accord and Satisfaction—Pleading—A defense of accord and satisfaction must be specially pleaded, and cannot be set up under a general issue or plea of not guilty.

Railroads—Injuries from Construction—Joint Liability.†—In an action by an adjoining property owner against a railroad and contractors for its construction for injuries sustained by blasting operations incident to such construction, the defendants' liability, if any, was joint, and neither was primarily or secondarily liable.

*See generally, foot-note appended to *Walther v. Chicago & W. I. R. Co.* (Ill.), 17 R. R. R. 456, 40 Am. & Eng. R. Cas., N. S., 456; *Atchison, etc., Ry. Co. v. Armstrong* (Kan.), 17 R. R. R. 415, 40 Am. & Eng. R. Cas., N. S., 415; *Johnson v. Charleston & W. C. Ry.* (S. Car.), 17 R. R. R. 447, 40 Am. & Eng. R. Cas., N. S., 447; *Smith v. St. Paul, etc., Ry. Co.* (Wash.), 17 R. R. R. 114, 40 Am. & Eng. R. Cas., N. S., 114; *Davis v. Charleston & W. C. Ry. Co.* (S. Car.), 17 R. R. R. 102, 40 Am. & Eng. R. Cas., N. S., 102; *Connors v. Yazoo & M. V. R. Co.* (Miss.), 17 R. R. R. 455, 40 Am. & Eng. R. Cas., N. S., 455; *Perrine v. Pennsylvania R. Co.* (N. J.), 17 R. R. R. 450, 40 Am. & Eng. R. Cas., N. S., 450; *Foust v. Pennsylvania R. Co.* (Pa.), 17 R. R. R. 156, 40 Am. & Eng. R. Cas., N. S., 156.

†For the authorities in this series on the subject of the liability of railroad companies for the negligence of independent contractors, see foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253.

Gossett v. Southern Ry. Co

Appeal from Circuit Court, Knox County; Joseph W. Sneed, Judge.

Three actions by C. C. Gossett and others against the Southern Railway Company and others. Judgments were rendered in favor of defendants in each case, and plaintiffs appeal. Reversed.

Pickle, Turner & Kenerly and *E. F. Mynatt*, for appellant.

Jourolman, Welcker & Hudson, for appellees Southern Ry. Co. and Condon.

Templeton, Lindsay & Templeton, for appellee W. J. Oliver & Co.

WILKES, J. These three causes were consolidated and heard together in the court below against the Southern Railway Company, W. J. Oliver, and S. P. Condon for damages resulting from blasting near the premises and home of the plaintiffs.

Some wordy controversy is had as to whether it is an action for a nuisance or an action on the case, with which we need not concern ourselves. The action is plainly one on the facts of the case; and the facts set out in the declaration, so far as necessary to be stated, are that plaintiff C. C. Gossett owned and occupied as a residence a certain house and lot near Knoxville. His wife and minor child, about two years old, resided with him and constituted his family. The defendant railroad located, graded, and constructed its line immediately adjoining the home and premises of the plaintiff, and within a few feet of their lot and residence house. Large quantities of dynamite and high explosives were used day and night for a long time in blasting and loosening earth and rock in the construction of the road by the railroad, and by Oliver and Condon, as contractors, causing great noises and explosions, shocks and concussions, of the earth and the air, near and at the home of the plaintiff, and greatly alarming and frightening the plaintiffs Carrie and Calvin Gossett, so as to deprive them of the necessary sleep, rest, and repose, and, it is claimed, impairing the health of the said Carrie, and alarming and terrorizing said Calvin, until they both became sick and disordered in body and mind, nervous, and otherwise injured, driving them away from home, at great trouble and expense, for several months.

To the declaration in each case, the defendants plead not guilty.

It appears that the railroad was constructing its line in front of the plaintiffs' premises, and had a force of from 80 to 100 men employed at it, working day and night, for 20 hours per day. They blasted rock during the day and during the night, using both deep blasts and surface or adobe blasts. This was done in a cut about 15 feet from plaintiffs' property, and 30 feet from their house.

The house was struck by flying stones, and the weather boarding was shattered. The concussions were so great that the

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windows in the house were smashed, and crockery, china, fruit jars, clocks, pictures, and other personalty were broken, shattered, and otherwise injured. Carpets, mattings, and curtains were likewise injured by the dust. The work was continued from August, 1903, to June, 1904, and as a consequence of the nervous strain and fright the wife and child were rendered very nervous, and deprived of rest and sleep during the night; and about January, 1904, they were compelled to leave their home and seek refuge and temporary rest in another locality. Gossett was put to extra expense in maintaining his family away from home, and at the same time looking after his property at home.

It appears that defendants repaired plaintiffs' house, so far as physical damage was done to it by the explosions; and for these and the injury to personal property no recovery is sought, but only for the injury, physical and mental, done to the plaintiff and his wife and child, and rendering the house uncomfortable and less valuable as a residence. At the conclusion of the evidence the defendants moved the court for peremptory instructions that there could be no recovery by the wife and child, on the ground that no physical injury had been shown to them, and therefore no recovery could be had in their behalf.

The court sustained this motion, and directed a verdict in favor of the defendants in these two cases, to which action the plaintiffs excepted. He then charged the jury in the third case of C. C. Gossett against the defendants, and under that charge the jury rendered a verdict in favor of the defendants, and the plaintiffs have all appealed to this court.

It is assigned as error that the court improperly instructed the jury to render a verdict in favor of the defendants against the wife and child, and, also, that he erred in his charge to the jury in regard to the liability of the defendants to C. C. Gossett, and that he refused to give in charge to the jury certain requests made by the plaintiffs. It is also assigned as error that there is no evidence to support the verdict.

Without attempting to dispose of the assignments of error as they are made, we proceed at once to consider the several interesting and difficult questions which are presented by the record and the assignments of error, promising that we think that they have all been virtually settled by former adjudications of this court, most of which are quite recent.

In the first place the fact that the defendant is quasi public corporation, authorized by the Legislature to condemn, take, and use land for railroad purposes and works of public improvement, cannot, under the authority conferred upon it by the Legislature, exempt it from liability, even if the work can be done without negligence.

We think the true doctrine is aptly expressed in the case of *Cogswell v. R. R.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701: "The powers granted to such railroad corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and

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under the same responsibility as though the act were done by an individual in the exercise of such powers." See, also, case of *Garvey v. L. I. R. R. Co.*, 159 N. Y. 334, 54 N. E. 57, 70 Am. St. Rep. 550.

The court proceeded upon the idea, and charged the jury upon the theory, that the railroad company and its contractors in constructing the railroad were engaged in what might be termed "governmental functions," delegated, first, to the railroad company by the state, and by the railroad company to its agents employed to do the work, and that, if no damage and injury were done to the plaintiffs than what was necessary to be occasioned in the prosecution of such work, then the defendants would not be liable. In other words, if the work was authorized and legitimate, then the defendants could only be made liable for the negligent prosecution of it. This is contrary to the holdings of this court, and, as we think, to the great weight of authority, though there are cases, a few of which have been cited to us by counsel, holding that, if the work is legitimate, then the only damage that can accrue to the company prosecuting the work must arise out of its negligent execution. In the case of *Madison v. Ducktown* (Tenn.) 83 S. W. 658, it was held that the defendants were conducting a lawful business in a lawful way, and by the most scientific and approved methods, and had made every effort known to science and experience to avoid injury to the plaintiff, but injury had resulted as a necessary consequence of the work itself; and the court further held that there was no other place to which the hurtful operations could be transferred. Still the court said that a judgment for damages in this class of cases is a matter of absolute right, where injury is shown.

This was a case where injury was inflicted by noxious fumes and smoke spreading from the furnace property over adjoining property, so as to create a nuisance and injure the adjoining property.

In the case of *Cumberland Telephone Company v. United Electric Railway*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, it was held, in substance, that a person, even in the prosecution of a lawful trade or business upon his own land, cannot gather there by artificial means a natural current, like electricity, and discharge it upon his neighbor with such force and to such an extent as to break up his business or impair the value of his property, without being responsible for the resulting injury.

The Fifth Baptist Church Case is a leading case upon this question; and it was there held, among other pertinent matters, that grants of privileges or powers to corporate bodies, like railroads, conferred no license to use them in disregard of the private right of others, and with immunity for their invasion.

It was there said: "The great principle of the common law, which is equally the teaching of the Christian morality so to use one's property as not to injure others, forbids any other application or use of the right and power conferred."

In the same case it is said: "The acts that a Legislature may

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authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public has control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state. It does not effect any claim of a private citizen for damages for any special inconvenience or discomfort not experienced by the public at large."

See case of *Railroad Co. v. Fifth Bap. Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

In the case of *Terminal Company v. Jacobs*, 109 Tenn. 741, 72 S. W. 957, 61 L. R. A. 188, it is said: "To claim exemption from liability resting upon a charter right, the answer may properly be made that the state has not authorized the wrong complained of; and in locating its roundhouse, so that the injury necessarily resulted to the adjacent landowner, it did so at its peril."

And, again, it is said: "Grants of powers to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion."

To the same effect, see the case of *Swain v. Tenn. Copper Co.*, 111 Tenn. 437, 78 S. W. 93. All of these cases have been cited, analyzed and commented upon in the case of *Louisville & Nashville Terminal Company v. Lellyett* (Tenn.) 85 S. W. 886 et seq., and many other cases, are there referred to. The gist of these decisions, so far as applicable to the facts of the present case and the questions here involved, is that a railroad company, in constructing its road, although it may be guilty of no negligence and exercise proper care and caution, will still be liable to adjacent property owners, if the work done, although necessary to be done, and in fact skillfully constructed, shall result in injury to such property. Most of the cases cited by counsel holding a contrary doctrine are cases in which the work was being done under government directions and control; and, so far as they do not rest upon this feature of government regulation and control, they are not in accord with the holdings of this court, nor, as we think, with the weight of authority, nor are they in accord with sound reason and legal justice.

It remains to be considered whether the injuries complained of in these cases were injuries for which liability arises.

In *Fitzsimons & Connell Company v. Braun and Fitts*, 59 L. R. A. 421, 199 Ill. 390, 65 N. E. 249, it was held that one who uses high explosives in excavating so near the property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused even by the vibration of earth or air, however high a degree of care he may have exercised in their use. To the same effect in *Longtin v. Persell* (Mont.) 76 Pac. 699, 65 L. R. A. 655; *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Scott v. Bay*, 3 Md. 431.

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Mr. Thompson, in his work on Negligence (section 772), uses this language: "The subordinate courts of the State of New York, following the analogy of early decisions in that state, have held that a railroad company is liable to an adjoining property owner for injuries which are the direct and necessary result of blasting rock by such company for the purpose of leveling its right of way, although such blasting is done without negligence, and although no rock or dirt is thrown upon the adjoining premises. But the Court of Appeals of that state have more recently held otherwise. In one of these decisions the action was against a contractor executing public work under the United States, and the decision proceeded partly upon the ground that he was acting in virtue of the sovereignty of the United States, and could not more be called to answer in damage than the government could. But the other case holds that a railroad company, in grading its right of way, can shake a dwelling house to pieces by the concussions produced by the frequent firing of blasts, without being liable to pay any damages therefor, provided it is made to appear that the blasting is necessary and that it is done without negligence. This decision, though concurred in by whole court, is directly opposed to principles laid down by the same court in early cases. It manifests such gross insensibility to justice that, although concurred in by the whole court, it scarcely deserves respectful mention."

Mr. Thompson, in his notes, cites the various cases referred to, most, if not all, of which are relied on by counsel in this case.

His own opinion of the law proceeds upon the view that the carrying on of an employment so dangerous near the land of another, thereby keeping him in continual danger and alarm, is a nuisance per se; so that, if any damage happens to him thereby, he may recover, irrespective of the question of diligence or negligence in carrying on the dangerous work. And he says: "If it is a nuisance per se, and the existence of negligence is necessary to support an action for the damage, it is for the same reason negligence per se."

Most of the cases to which we have been referred and which we have been able to find, involving damages by blasting, proceed upon the idea of a trespass upon the adjoining property, where dirt or rock or other material is actually thrown upon it, as where the buildings and improvements are damaged and shaken; and the right of recovery in such cases seems to be clear, as it is also where water is illegally thrown upon a man's land, but the present case goes further than this. All these physical damages to the property caused by the blasting, it is shown, have been settled for and satisfactorily adjusted. The present action is for rendering the home uncomfortable, insecure, and unpleasant, and for virtually compelling the occupants to vacate the premises during the time when the work was being prosecuted; and it is said that the noise and discomfort from the repeated concussion and loud noises was so great as to affect the comfort

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and health of the family. It is not shown that any of them were made sick; but they were inconvenienced, frightened, and made restless, so that the home was no longer a place of refuge and quiet, and it became untenable as a home for several months, and it is for this class of damages that the suit is brought; and the argument is made that there is liability for noise which creates discomfort and nervous disturbance, just as there is for gas and smoke, solids and liquids, which affect the comfort and health of the tenant. Our courts have recognized the right to damages in cases of nuisances arising from foul odors, smoke, and gas; and there is no good reason why the same doctrine would not apply to loud noises and unusual and unpleasant concussions in the air. In support of this doctrine we are referred to *Knoxville v. Klasing*, 111 Tenn. 134, 76 S. W. 814; *Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823; *Swain v. Copper Company*, 111 Tenn. 432, 78 S. W. 93; *Ducktown Copper Co. v. Barnes* (Tenn. Sup.) 60 S. W. 600; *Madison v. Copper Co.*, 113 Tenn. 336, 83 S. W. 658.

Bearing upon this feature of the case, it is said that in *L. & N. Terminal Co. v. Lellyett* (Tenn.) 85 S. W. 889:

"It is not every inconvenience or discomfort that will entitle a property holder to damages, even though it be material or considerable, and especially as against a public or quasi public enterprise. The noise of paved streets and street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material annoyance and discomfort to persons living near by; but these are discomforts and annoyances which the individual must bear in deference to the convenience and comfort of the public. The noise of trains passing through the country districts, and the dust of vehicles passing along public highways, may be great annoyances to persons living along the line of such highways, and the rumbling of carriages of belated revelers and early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but it is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. See *Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622."

In such case it is a nuisance and actionable. And this is the rule that prevails in all cases, whether it be an individual, a private corporation, or a quasi public corporation. In all such cases the maxim *sic utere tuo* applies, and no matter how lawful or necessary the improvement may be, nor skillfully it may be constructed, nor carefully it may be operated, if it results in injury to the adjoining property owner, the party causing it is

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liable in damages, either recurring or permanent, dependent upon whether the nuisance is abated or not.

Under the rules which we have laid down in the cases we have cited and commented upon, we are of opinion that there could be no damages, or rather no liability, to the wife and child in this case.

There is no evidence that they were physically injured, nor that their healths were impaired. The most that is proven is that they were disquieted and kept in a state of alarm and apprehension, but this is not shown to have resulted in any sickness or physical injuries.

We think, therefore, that the trial judge was not in error in instructing the jury that these parties had no right of action.

The question which should have been submitted to the jury, in our opinion, is whether the injuries complained of in this case amounted to a nuisance, and whether the usable or rental value of the homestead was destroyed or lessened temporarily to such an extent that the law will award damages therefor.

It is not claimed that there were any permanent damages to the freehold. We think the case should have been submitted to the jury upon this theory, and, in not doing so, the trial judge committed error. If the plaintiff was driven from his home by the blasting and other operations carried on by the defendants, or his comfort was so interfered with as to lessen the desirability and usable value of his home during the time the work was being prosecuted, for these things the plaintiff should be entitled to recover.

The trial judge instructed the jury that they might find an accord and satisfaction of the plaintiff's claim for damages, if the facts should so justify.

We think this was error, as there was no plea of accord and satisfaction, and that defense could not be set up under the general issue or plea of not guilty.

We think that, if there is any liability for damages under the facts of this case, it is a joint liability upon the part of the railroad and the contractors, and in such case we do not understand that there is such a thing as primary and secondary liability.

For the reasons which we have indicated, the judgment of the court below in the case of C. C. Gossett v. Southern Railway Company et al. is reversed, and the cause is remanded for a new trial, and the defendants will pay the costs of the appeal; and the judgments in the cases of C. C. Gossett and Wife, and Calvin Gossett, by Next Friend, v. Southern Railway Company, are affirmed, and these causes are dismissed, at the cost of the plaintiffs herein.

LOUISVILLE & N. R. Co. *v.* MOLLOY'S ADM'X.

(Court of Appeals of Kentucky, March 2, 1906.)

[91 S. W. Rep. 685.]

Continuance—Absent Witnesses—Refusal.—Where there was nothing in the testimony of an absent witness, as given in the affidavit for a continuance, to show that the proper effect of such testimony could not be had without the presence of the witness, the court properly refused to continue the case and allowed the affidavit to be read as the deposition of the witness.

Railroads—Operating over Crossings—Duty to Moderate Speed.*—The rule that the speed of trains must be moderated at crossings applies to cities and towns where the population is dense and the presence of persons may be anticipated on the track, but does not apply to highway crossings which, while within the corporate limits of a town, are not within the settled part of the town and are practically country crossings, and at such crossings no rate of speed is negligent; but, where the speed of the train is great, care commensurate with the danger in giving warning of the approach of the train must be observed.

Same—Duty to Give Signals.—Ky. St. 1903, § 786, requiring railroad locomotives to ring the bell and sound the whistle at crossings outside of incorporated cities and towns, applies to a crossing which is just within the limits of an incorporated town, but which is outside of the settled portion thereof, and is in effect a country crossing.

Same—Actions for Injuries—Instructions.—In an action for the death of a traveler on a highway caused by a collision with a train at a railway crossing, where the evidence showed that it was impracticable for those in charge of the train to stop the train, after coming in sight of deceased, before reaching the crossing, a charge that it was the duty of the trainmen in charge of the engine to keep a lookout to prevent injury to travelers upon the highway, and authorizing a finding for plaintiff, although deceased was himself negligent in attempting to pass over the crossing in front of the train, if defendant's servants knew or should have known of deceased's peril in time to avoid injury, was erroneous.

Negligence—Imputed Negligence.†—A person riding in a buggy with a liveryman, whom he has employed to drive him from one town to another, is not chargeable with the negligence of his driver in case of a collision with a train at a highway crossing.

Railroads—Accident at Crossing—Contributory Negligence—Instructions.—In an action for the death of a traveler on a highway caused by a collision with a train at a railway crossing, a charge that, if decedent was killed while acting as a person of ordinary prudence placed in such a position might reasonably act, it was immaterial that he might have escaped injury if he had followed some other course, should have been given in place of a charge that decedent was

*For the authorities in this series on the question whether any rate of speed of a train at a country crossing constitutes negligence, see foot-notes appended to *Vizacchero v. Rhode Island Co. (R. I.)*, 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

†For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas (Colo.)*, 17 R. R. R. 167, 40 Am. & Eng. R. Cas., N. S., 167; foot-notes appended to *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *Sluder v. St. Louis Transit Co. (Mo.)*, 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293; *St. Louis & S. F. R. Co. v. McFall (Ark.)*, 16 R. R. R. 243, 39 Am. &

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not guilty of contributory negligence, if he was injured and killed while using such means as then appeared to him to be reasonably necessary to avoid danger.

Same.†—A person riding in a buggy, who, when at a safe distance from the track, undertook to cross a railway crossing ahead of a train which he knew was approaching, assumed the risk of any resulting injury.

Evidence—Res Gestæ—Declarations after Accident.—In an action for the death of a traveler on the highway caused by collision with a train at a railway crossing, declarations made at the scene of the accident, and within three minutes after its occurrence by the person who was driving deceased, to the effect that deceased had advised him to attempt to cross ahead of the train, were admissible as *res gestæ*, although the declarant was at the time badly hurt and seemed not to be in his right mind.

Same—Opinion Evidence—Competency.§—In an action for death of a traveler on a highway caused by collision with a train at a railway crossing, testimony that the crossing was dangerous is incompetent.

Nunn, J., dissenting.

Appeal from Circuit Court, Barren County.

"To be officially reported."

Action by Sam C. Molloy's administratrix against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield, William A. Northcutt, and Jas. A. Mitchell, for appellant.

V. H. Baird, T. W. Thomas, Greer & Marble, T. W. & R. C. P. Thomas, and Baird & Richardson, for appellee.

HOBSON, C. J. On Sunday, March 27, 1904, Sam C. Molloy, an attorney, on his way to Brownsville to attend court on the next day, reached Glasgow Junction on the morning train, and hired L. H. Oller, a livery stable man, to take him over to Brownsville in a buggy. They got in the buggy about 12 o'clock,

Eng. R. Cas., N. S., 243; foot-notes appended to *Chicago Union Traction Co. v. Leach* (Ill.), 16 R. R. R. 220, 39 Am. & Eng. R. Cas., N. S., 220.

†For the authorities in this series on the question whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of an approaching train which was seen by the highway traveler to be approaching before he made the attempt, see foot-note appended to *Criss v. Seattle Electric Co.* (Wash.), 17 R. R. R. 853, 40 Am. & Eng. R. Cas., N. S., 853; *Coats v. Seattle Electric Co.* (Wash.), 17 R. R. R. 165, 40 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488.

§For the authorities in this series on the question of the admissibility of expert testimony and opinion evidence, see foot-notes appended to *Denver & R. G. R. Co. v. Scott* (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; *Macon Ry. & L. Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; *Birmingham Ry., etc., Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; foot-notes appended to *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

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and started to Brownsville. From the hotel from which they started the road to Brownsville runs for about a quarter of a mile parallel with the Louisville & Nashville Railroad, and at this point it abruptly turns to the right, going up a slight incline across the railroad track. Just as the horses reached the track, a freight train going south, running rapidly, struck the buggy, killing Molloy and seriously hurting Oller. This suit was filed by Molloy's administratrix to recover damages for his death, and, verdict and judgment having been rendered in her favor for \$9,000, the railroad company appeals.

Glasgow Junction is a town of 250 inhabitants. The crossing in question, though within the town boundary as established by the Legislature, is outside the built-up portion of the town. The crossing is 1,200 feet from the station; it is 438 feet from the railroad section house, and 490 feet from the next nearest house. Five thousand one hundred and seventy feet north of the crossing is a tunnel. When the train in question came out of the tunnel, the engineer blew the usual station signal, one blast of the whistle. The conductor gave him what is called the high-ball; that is, an order to go ahead. He recognized the signal by two blasts of the whistle. Soon after this the engineer blew four blasts of the whistle for the semaphore, which is controlled by the agent at the station, and, the semaphore being turned, responded by two blasts of the whistle in recognition of the signal. After this, and before he reached the station, he blew the usual signal for the road crossing north of the station and 600 or 700 yards from the crossing in question. After passing this crossing, according to the plaintiff's proof, the engineer did not blow his whistle or ring the bell or give any signal of the approach of the train to the crossing where Molloy was killed, until he was within a short distance of it. The train was a heavy freight, running about 30 miles an hour. The proof for the plaintiff also showed that the engineer, after passing the station, instead of keeping a lookout on the track in front of him, turned to wave a signal to a lady who lived on the side of the road, and was looking at her until shortly before the collision. On the other hand, the proof is that Oller left the hotel with Molloy in the buggy in a brisk trot, and that the train came along at just about the time it would take them to get to the crossing. In going along the pike the view of the train coming from the north would be obstructed until the parties turned to go upon the railroad and got within 30 or 40 feet of the center of the track. After this the train could be seen by the occupants of the buggy, and the engineer of the train might have seen the team approaching the track. The engineer testified that the first he saw of the team was the head of the horses as they came out from behind the obstruction, when he was about 100 feet from them. He admitted waving to the lady, but said that he had turned round to his position some little time before the horses came in sight; that as soon as he saw them he gave the alarm, and put on the brakes, but that before the train could be checked

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it had run far past the crossing. The proof for the defendant also showed that the whistle was blown for this crossing, and that the bell was ringing as the train approached. Just where the road turns to go up to the railroad there is a swag. The defendant showed by several witnesses that, when the occupants of the buggy were about 40 feet from the crossing, they were looking toward the train which they could see coming; that the man on the left-hand side of the buggy then struck the horses with the whip and rushed them on the track, where they wheeled quickly to the left just as the train came up, killing the horse next to the train, and killing Molloy, who was on that side of the buggy. That the train whistled a number of times as it approached the station is testified to by all the witnesses, both for the plaintiff and the defendant, and these whistles were heard by persons much further from the train than the occupants of the buggy. A number of matters are relied on for reversal.

The defendant asked a continuance on the ground of the absence of Ellis Ford. An order had been made for the personal attendance of Ford at the trial, but the court properly refused to continue the case allowing the affidavit to be read as his deposition. There was nothing in his testimony as given in the affidavit to show that the proper effect of his testimony could not be had without the presence of the witness. He was absent from the state, and no subpoena had been served on him.

The evidence was sufficient to justify the submission of the case to the jury, and the court properly refused to give to the jury a peremptory instruction to find for the defendant. There was also some evidence of gross negligence, and the court did not err in submitting this question to the jury.

We see no substantial objection to the second, fifth, sixth, and seventh instructions.

The third, fourth, and eighth instructions are as follows:

"(3) The court instructs the jury that it was the duty of the defendant's agents and servants in charge of its freight trains, in running same, to use ordinary care to prevent collisions with and injury to persons traveling the public highway where it crosses defendant's railroad track at the place of the collision with said Sam C. Molloy, by beginning the giving of reasonably sufficient signals for said crossing at a reasonably sufficient distance from said crossing when approaching same, and continuously, or at intervals, repeating said signals until the engine of said train reached said public highway crossing, in a reasonably sufficient manner to warn persons about to cross said railroad track upon said highway of the approach of said trains, and by keeping a lookout in approaching said public highway crossing for persons traveling upon said highway using or about to use said public highway crossing, and by approaching said crossing at such rate of speed as was reasonably consistent with the safety of persons traveling upon said highway and using or about to use said crossing, considering the character of the crossing, its surroundings, and its use by the traveling public. And if the

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jury believe from the evidence in this case that on the occasion in controversy the defendant's agents and servants in charge of said trains did negligently fail in approaching said crossing to give such signals, or to keep such lookout or to use such rate of speed, and shall further believe from the evidence that said Sam C. Molloy was injured and killed by reason of such negligent failure, if any, of defendant's said agents and servants to give said signals, or keep said lookout, or use said rate of speed, they shall find for plaintiff.

"(4) The court further instructs the jury that it was the duty of the engineer and fireman or other trainmen in charge of the engine of said train to keep a lookout in approaching said crossing to prevent injury to those traveling upon the highway over said crossing, and although the jury may believe from the evidence that said Molloy was himself negligent in attempting to pass over said crossing in front of said train and thereby contributed to his injury and death. If the jury further believe from the evidence that defendant's aforesaid agents and servants in charge of said train and engine knew, or by the use of ordinary care could have known, of the peril of said Sam C. Molloy in time to have prevented the injury to him, by the use of ordinary care, they should find for plaintiff and fix damages according to instructions Nos. 1 and 2."

"(8) The court instructs the jury that, if they shall believe from the evidence that the decedent, Sam C. Molloy, was placed in imminent danger by the negligence of the defendant, its agents, servants, or employees, on the occasion under investigation, then he had a right to use any means that appeared to him under the circumstances to be reasonably necessary to avoid such danger, if there was such danger, and, if the decedent, while using such means as then appeared to him to be reasonably necessary to avoid such danger, was injured and killed, still he was not guilty of contributory negligence, and the jury will so find."

The third instruction is erroneous, in requiring that the train should approach the crossing at such a rate of speed as was reasonably consistent with the safety of persons traveling upon the highway. The rule that the speed of trains must be moderated applies to cities and towns where the population is dense and the presence of persons may be anticipated on the track at crossings, but it does not apply to highway crossings in the country. While this crossing was within the corporate limits of the town, it was not within the settled part of the town, and was practically a country crossing. The rule is that at ordinary highway crossings in the country no rate of speed is negligent, but that, where the speed of the train is great, care in giving warning of the approach of the train commensurate with the danger must be observed. *Railroad Co. v. Goetz's Adm'x*, 79 Ky. 442, 42 Am. Rep. 227; *Parkerson v. L. & N. R. R. Co.*, 80 S. W. 468, 25 Ky. Law Rep. 2260. This being in effect a country crossing, the statutes applies. Ky. St. 1903, § 786. Signals as required

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by the statute should be given. There was no town ordinance regulating the signals to be given, and the statute does not mean that less care may be exercised at a crossing like this when just inside of the town boundary, than if it was just outside of the town boundary. The fourth instruction should have been omitted. Under the evidence it was clearly impracticable for those in charge of the train, after the team started up the incline and came in sight of the train, to have stopped the train before reaching the crossing, or to have avoided striking the vehicle. The jury may have inferred from this instruction that the defendant was liable if proper signals were not given, although there was contributory negligence on the part of the decedent.

Oller was a common carrier of passengers, and Molloy was no more chargeable with his negligence than he would have been for the negligence of the motorman if riding on an electric car. The latter part of the eighth instruction, following the words "Such danger," did not accurately state the rule of law applicable, which is thus put in 1 Shearman & Redfield on Negligence, § 89: "In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and, if the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise, especially if his peril is caused by the defendant's fault. If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. When the question is one of mere inconvenience, and not actual danger, some moderate risk may be taken, if there is no obvious danger. But the plaintiff will be chargeable with contributory negligence if he runs the risk of an obvious and serious danger merely to avoid inconvenience." The same rule was announced by this court in *South Covington, etc., Railway Company v. Ware*, 84 Ky. 267, 1 S. W. 493.

In lieu of the latter part of the instruction, the court should tell the jury that, if the decedent, while using such means and acting as a person of ordinary prudence placed in such a position might reasonably act, was injured and killed, it was immaterial that if he had followed some other course he might have escaped injury. The defendant asked the court to give the jury this instruction, which was refused: "The court instructs the jury that, although they may believe from the evidence that the defendant, or its servants in charge of the train, did not exercise ordinary care as defined in the instructions, still, if the jury believe from the evidence that the deceased, Molloy, when at a safe distance from the track, knew of the approach of the train, and

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with this knowledge undertook, or negligently permitted, L. H. Oller, who was seated in the buggy with him, to pass over the crossing ahead of the train, he (said Molloy) assumed the risk, and the defendant is not liable, and the jury should so find." The object of signals of the approach of a train is to notify persons of its coming. If a person in fact knows of the approach of the train, he cannot complain that signals of its approach were not given as required by law. There was evidence in the case to the effect that Oller and Molloy knew of the approach of the train before they attempted to drive on the track, and in time to have avoided the injury. There was also proof from which the jury might conclude that with knowledge of the train's approach they undertook to beat it across the crossing. If, when at a safe distance from the track, Molloy knew of the approach of the train, and with this knowledge undertook or consented for Oller to undertake to pass over the crossing ahead of the train, he assumed the risk, and the defendant is not liable. *Helm v. L. & N. R. R. Co.*, 33 S. W. 396, 17 Ky. Law Rep. 1004; *I. C. R. R. Co. v. Jackson's Administrator*, 79 S. W. 1187, 25 Ky. Law Rep. 2087. The court should have instructed the jury as above indicated. This idea was not presented in any of the instructions given.

The evidence of the witness R. T. Butler, as to what Oller said to him, was competent as *res gestæ*. Butler was a short distance off and witnessed the collision. He was the first person to get to Oller, and what Oller then said was properly admitted as substantive evidence. Dr. Blakeman was driving in a buggy approaching the crossing. He was about a quarter of a mile from the crossing at the time of the collision and drove rapidly up to it. When he got there Mr. Butler and Mr. Dearing were there. Only two or three minutes had elapsed when he got there. John Burnett was sitting on his porch 475 yards away and ran to the crossing at once, getting there just about the time that Dr. Blakeman did, or a little after. He asked Oller, "How in the world did this thing happen?" Oller said he had started with this gentleman to Brownsville, and when they got in the flat this side he stopped and told the gentleman to hold on, that they had better not try to cross, and the gentleman told him that he thought they could get across, and they started up. When they got right upon the railroad, the gentleman grabbed the lines and aimed to turn the horses to the left, and the engine struck the right-hand wheels and killed the right-hand horse. This occurred at the scene of the wreck, while Molloy was still lying there insensible and before anything had been moved. It is in substance the same statement as was made to Butler. Oller made the same statement at the same place to Garvin, the operator, about the same time, and within two or three minutes after the accident. Each of these statements were made by Oller within three minutes after the occurrence, and should have been admitted as *res gestæ*, being made at the scene of the wreck and so soon after its occurrence as to be fairly regarded as part of it and a verbal

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act explaining it. Insurance Company v. Mosley (U. S.), 8 Wall. 397, 19 L. Ed. 437; McLeod v. Ginther's Adm'r, 80 Ky. 399; Dills v. May, 3 Ky. Law Rep. 765; L. & N. R. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866; L. & N. R. R. Co. v. Shaw's Adm'r, 53 S. W. 1048, 21 Ky. Law Rep. 1041; Floyd v. Paducah Ry. Co., 64 S. W. 653, 23 Ky. Law Rep. 1077; Petrie v. Cartwright, 70 S. W. 297, 24 Ky. Law Rep. 903, 59 L. R. A. 720. The statement to Butler was admitted as *res gestæ*, and the statements to the other witnesses named, which followed in such close connection, at the same place, and as they arrived on the scene, must be equally admissible; for it is hard to separate part of these declarations from the others, they being all in substance to the same effect. The proof that Oller at the time was badly hurt, and that he seemed not to be in his right mind, is a fact to be weighed by the jury in determining what weight they will give these declarations; but the statements are nevertheless competent for their consideration. Oller was an actor in the transaction. These statements grew out of the transaction and are so connected with it as to be properly regarded as the transaction speaking. The statements of Oller afterwards made to the trainmen after they backed up, to the agent, E. Beeler, and Mrs. Mentz, may be admitted for the purpose of contradicting Oller as a witness, but not as substantive evidence in the case.

The plaintiff was allowed to prove by eight witnesses that the crossing was dangerous. The jury, when the facts were proved to them, were as competent to judge of this matter as the witnesses. The witnesses were not experts, and it was not a subject for expert testimony. All railroad crossings are necessarily dangerous. The facts as to the crossing may be shown, but the witnesses should not be allowed to give their opinions on a matter that is not the subject of expert evidence. L. & N. R. R. Co. v. Millikin, 51 S. W. 796, 21 Ky. Law Rep. 489; Alabama, etc., R. R. Co. v. Hall, 105 Ala. 599, 17 South. 176; Smuggler, etc., Co. v. Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; Tolson v. Coasting Co., 17 D. C. 44; District of Columbia v. Haller, 4 App. D. C. 405; Mayor v. Wood, 114 Ga. 370, 40 S. E. 239; Chicago v. McGivens, 78 Ill. 348; Albion v. Hetrick, 90 Ind. 549, 46 Am. Rep. 230; Hill v. Railroad Co., 55 Me. 444, 92 Am. Dec. 601; Lawson v. R. R. Co., 64 Wis. 459, 24 N. W. 618, 54 Am. Rep. 634.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

NUNN, J., dissenting.

ABLARD v. DETROIT UNITED RY.

(Supreme Court of Michigan, March 7, 1905.)

[102 N. W. Rep. 741.]

Collision between Street Car and Other Vehicle—Negligence of Motorman.*—A motorman who was running his car, on a dark night, about twice as fast as he should have run it to enable him to control the car so as to prevent an accident, and who relied solely upon his gong to warn travelers upon the track of the approach of the car, was negligent.

Right of Public to Use Street Car Tracks.†—Ordinary travelers have the right to use every part of the highway, including the space between the rails of a street car line, until it becomes necessary for them to yield that space to its cars.

Care Required of Person Driving on Street Car Tracks.‡—It is the duty of one driving upon a street railway track to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent man would do; but he may rely to some extent upon the exercise of proper caution on the part of motormen in controlling their cars, and giving notice of their approach, and need not be constantly looking back, nor take into consideration the fact that a car following him may be running at a reckless rate of speed.

Negligence—Driving on Street Car Tracks.—It is not negligence per se for one to drive along the track of a street railroad in the nighttime, although the street is of sufficient width to permit him to drive off the track, where cars cannot strike him.

Contributory Negligence—Question for Jury.—In an action against a street railway for injuries to one driving a van on the tracks, caused by a collision with a car approaching him from the rear, whether plaintiff was guilty of contributory negligence held, under the evidence, a question for the jury.

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Searles v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781; foot-notes appended to *Holden v. Missouri R. Co.* (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; foot-note appended to *Anniston Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., 312.

†See foot-notes appended to *Conrad v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 126, 36 Am. & Eng. R. Cas., N. S., 126; *Portsmouth St. R. Co. v. Peed* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65; *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668; *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442.

‡As to the care required of those driving other vehicles on streets upon which street cars are operated, see foot-note appended to *Sullivan v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *McGavley v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247; *Hogan v. Winnebago Traction Co.* (Wis.), 11 R. R. R. 232, 34 Am. & Eng. R. Cas., N. S., 232.

Ablard v. Detroit United Ry

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by Thomas Ablard against the Detroit United Railway. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and MCALVAY, GRANT, BLAIR, and HOOKER, JJ.

Corliss, Andrus, Leete & Joslyn, for appellant.

Allan H. Frazer and Wm. H. Turner, for appellee.

BLAIR, J. About half past 9 in the evening of June 20, 1902, Thomas Ablard, the plaintiff, was injured on Forest avenue, in the city of Detroit, by a collision between a street car and his moving van. After loading his van with furniture from a house on Mt. Elliott avenue about half a block north of Forest avenue, plaintiff drove south to Forest avenue, turned west on that street, and drove on west, with the wheels of his van "straddling" the north rail of the north track of defendant's street railway on Forest avenue. When he had just passed Galster street, some 1,900 feet west of Mt. Elliott avenue, his van was struck by a street car approaching from behind on the same track over which he was driving. The defendant maintained double tracks on Forest avenue. On the south track its cars run in an easterly direction. West-bound cars use the north track. Plaintiff was familiar with this street, and with the operation of defendant's cars thereon, and knew that they ran pretty frequently going both ways. The street was well paved, and was 70 feet wide between the property lines. The space between the north curb and the north rail was 12 feet 8 inches wide. There was an electric tower light a block east of the place of the accident. The night was dark, and it was raining slightly, but where vision was unobscured the plaintiff's van could be seen, according to the estimates of different witnesses, from one to three blocks, or, according to the motoneer, one and one-half blocks away. The van was about 11 feet high, 16 feet 4 inches long, with a top 20 feet long, 6 feet 8 inches wide at the tires of the rear wheels, and 7 feet 8 inches from the outside of the rear hubs. The load of furniture weighed some 3,000 pounds, and prevented the driver from looking back through the van. Plaintiff sat in the middle of the seat when driving, and when he wished to look back had to move to one side.

The only point raised by defendant's counsel in his printed brief and on the oral argument in this court is that upon the record plaintiff was guilty of contributory negligence, and that the court should have directed a verdict for the defendant. We do not think that the court would have been warranted in directing a verdict for the defendant on the ground of plaintiff's contributory negligence under the circumstances of this case. The plaintiff testified in his own behalf as follows: "Q. Did you in going up Forest look back? A. We always look back. Mr. Leete: I

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move to strike that out. The Court: Strike it out. A. Well, I looked back. Q. Also ahead? A. Yes, sir. Q. What did you do also with reference to keeping track of any car coming behind you? A. We were always watching. Mr. Leete: I move to strike that out also. The Court: What you were always doing is not evidence of what you did on that night. Q. What did you do on this occasion? A. I was watching for the car. Q. Did you see this car? A. No, sir. Q. When you last looked, will you state had any car come around the turn? A. There was none that I could see. Q. Did you see any? A. No, I did not. Q. Will you state whether you did anything with reference to listening for the bell? A. Yes, sir; I listened. Q. Did this motorman sound a bell? A. I did not hear any. * * * Q. Were you singing that night? A. Just a little bit of a hum that I have. Q. Singing so that the people in the houses could hear you? A. No, sir; because I couldn't sing if I wanted to sing. * * * Q. Now, were you not singing so that you could be heard on the streets and in the houses near by? A. Not that I know of. They might have heard me. Q. You were not thinking of listening for the gong of a car while singing that way? A. Yes, sir; we were always watching. * * * Q. And not thinking of listening for any particular alarm that might be given? A. I was always watching. That was an instinct that we had—that we were always watching. Q. Well, that singing would not help your hearing. A. And did not injure. That humming that I was doing would not injure my hearing at all. * * * Q. What was the reason you could not see it when it was a half block behind you? A. Because from the last time I looked it came upon me so quick." Defendant's motorman, Fred Schultz, testified: "The night I had the accident was a dark, rainy night. The rain came upon my vestibule from the west. It beat upon the front window. In operating the car before the accident I wiped the window about ten minutes before on Kercheval avenue. After I had cleaned the window at that time I was running the car. I had no opportunity after that up to the time of the accident to clean the window. The effect of the rain coming on the window of the vestibule was to blur the glass. Going along Forest avenue I was on the north track. I came onto Forest avenue at Mt. Elliott, going towards the west. The night, aside from the rain, was dark. As I got along near Moran street coming towards Galster or Collins, I was operating my car the right way, occupying the vestibule and keeping a lookout. Between those streets I was sounding the gong. The gong is sounded with the foot. I could see, when operating the car going west, under the conditions I have described, ahead of me about sixty or seventy feet. When I first discovered that there was any obstruction on the track, I was about near Galster. Then I noticed a dark object up in front of me. I could not distinguish what it was. It appeared to be about sixty or seventy feet ahead." Witness further testified that when he was off the car he could see about a block and a half down the street. "That it took about a minute and a half to run from Mt. Elliott avenue

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to the place where I struck Mr. Ablard's van. I knew at the time and before that wagons, carriages, and people were liable to be ahead of me at any spot or place on the track. I looked out for them for myself. My life is in my hands. It was raining, and that obscured my vision looking through the glass to a certain extent. I could see about sixty or seventy feet ahead of me. That is all I could see, and after that dark. I could not distinguish whether there was any object on the track or not. The headlight gave a view twenty feet ahead." Witness further testified that, taking in consideration the distance the car would slide, it required 125 feet in which to stop it. "Q. Now, then, at what rate would you have to run in order to control your car so that you could stop after you saw an object and save it from damages? A. About seven or eight miles an hour. Q. So that on this night that you say was dark and rainy, and the rain on your glass, by running your car seven or eight miles an hour, you could have it under such control that, so far as you could see, you would be able to stop the car, and avoid the collision? A. Yes, sir. Q. Why didn't you do that? Mr. Leete: He has already told you he had a gong for signal. Q. And then you preferred simply to rely on your gong? A. Yes, sir. * * * A. I was running about ten miles an hour on six points at the time of the collision. There are six points, and I had her up to the limit. That is, at the time I shut her off she was running on six points, and at full speed; the same speed that I would run on a sunshiny day up there." The motorman testified that he rang the gong, but plaintiff gave evidence tending to show that no gong or bell was rung. If the testimony of the motorman that he ran from Mt. Elliott avenue to the place of the accident, some 1,900 feet, in about a minute and a half, is correct, then his car was moving at the rate of nearly $14\frac{1}{2}$ miles an hour; and some of the witnesses on plaintiff's behalf put the speed at 15 miles or more. It is apparent that at this rate of speed he was running about twice as fast as he should have run, under his own testimony, to enable him to control his car so as to prevent an accident, with the limited vision afforded him. He also makes it clear that he expected to find people upon the track, but relied upon his gong to warn them off the track, knowing that, if they did not heed the warning, he must inevitably collide with them. If he traveled 1,900 feet in a minute and a half, he was traveling about 21 feet a second, and if, therefore, he could only see this large van some 60 or 70 feet ahead of him, the driver of the van would have less than four seconds in which to get off the track, provided the warning was given at the precise instant of discovery. The probability would be infinitely great of a collision under such circumstances, and it is apparent from the testimony of the motorman himself that his conduct of the car was extremely negligent.

It has been repeatedly held by this court that street railway companies do not possess an exclusive right to that portion of the highway covered by their tracks, but that the ordinary traveler upon the highway has a right to use every portion of the

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highway, including the space between the rails, until it becomes necessary for him to yield the track to the cars of the company. In using the track of the street railway company, however, it is the duty of the traveler to keep in mind the fact that cars will be likely to follow and overtake him, and to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent man would. It was not negligence per se for the plaintiff to drive his team along the track of the street railway in the nighttime, although there was room for him to have driven off the track, and where he could not have been struck by an approaching car. Whether the plaintiff looked back for the car as often as a reasonably prudent man should, we think was properly submitted to the jury under the circumstances of this case. We do not think he is required to be constantly looking back, or that he is necessarily negligent for not seeing the car. He has a right to rely to some extent upon the exercise of proper caution on the part of the motorman in controlling his car in accordance with his legal duty, and giving notice of its approach. It was the duty of the motoneer to have the car under such control as to admit of its being stopped after he became able to discover objects on the track, and before a collision with such objects should occur, and it was his duty to give timely warning of his approach. If the motoneer had performed his plain legal duty under the decisions of this court, he would have been able, after discovering plaintiff's position, to have stopped his car and avoided a collision. He chose, however, to run at such a rate of speed, when his vision was limited by the darkness and the rain, that, as testified by himself and uncontestably shown by the result, he could not stop his car in time to avoid the collision. We do not think it can be said, under such circumstances, that plaintiff was bound to take into consideration that the car which struck him might be run at such a reckless rate of speed; and the jury might well have found that, if the car had been run at the rate of speed at which the motorman said he could control it in time to prevent an accident, its approach would have been observed by plaintiff. Plaintiff testified that he looked for the car, and that the last time he looked, no car was in sight, and that he was constantly watching and listening for its approach, and that the only reason he did not see it in time was because it came so quick after he looked the last time. We think that the question of contributory negligence was properly submitted to the jury. *Rouse v. Ry. Co.*, 128 Mich. 149, 87 N. W. 68; *Id.* (Mich.), 98 N. W. 258; *Id.* (Mich.) 100 N. W. 404; *La Pontney v. Shedden Co.*, 116 Mich. 514, 74 N. W. 712; *Manor v. Ry.*, 118 Mich. 1, 76 N. W. 139; *Mertz v. Ry.*, 125 Mich. 11, 83 N. W. 1036; *Tunison v. Weadock*, 130 Mich. 141, 89 N. W. 703; *Bedell v. D. Y. A. A. Ry.*, 131 Mich. 668, 92 N. W. 349; *Mahoney v. Ry.*, 110 Cal. 471, 42 Pac. 968; *Chauvin v. Ry. Co.* (Mich.), 97 N. W. 160.

The judgment is affirmed, with costs.

COLORADO & S. RY. CO. *v.* SONNE.

(Supreme Court of Colorado, Oct. 2, 1905.)

[83 Pac. Rep. 383.]

Railroads—Injuries to Person on Track—Contributory Negligence.—Plaintiff, injured by being struck by a loose car in a switch yard, was familiar with the tracks and knew the company's method of operating its trains. He attempted to cross the track on which the car was moving without looking or listening for the approach of cars. Had he looked, he could have observed cars on the track for some distance. He knew that switching was being done. Held, that he was guilty of contributory negligence as a matter of law.

Same—Care Required of Persons on Tracks.*—A person in a railroad yard on the invitation of the company is not relieved from exercising a reasonable degree of care to avoid injury.

Same—Care Required of Railroad Company.†—A railroad company owes to a person in its yards on lawful business the duty of having its premises in a reasonably safe condition and to prevent injury to him from any unusual danger; but this obligation does not require it to make the place absolutely safe.

Appeal from District Court, Gilpin County; A. H. De France, Judge.

*For the authorities in this series on the subject of the care required of licensees, see *Elgin, etc., Ry. Co. v. Thomas* (Ill.), 17 R. R. R. 356, 40 Am. & Eng. R. Cas., N. S., 356 (contributory negligence of person accompanying shipment of cattle, and killed by train in yard); *McConkey v. Oregon R. & Nav. Co.* (Wash.), 12 R. R. R. 267, 35 Am. & Eng. R. Cas., N. S., 267 (contributory negligence in walking on railroad bridge at night); *Bishop v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328 (contributory negligence in alighting from moving train was a question for the jury); *Batchelder v. Boston & M. R. R.* (N. H.), 11 R. R. R. 545, 34 Am. & Eng. R. Cas., N. S., 545 (contributory negligence in walking on track without exercising ordinary vigilance precludes recovery if trainmen did not actually know of licensee's presence); foot-note appended to *King v. Illinois Cent. R. Co.* (C. C. A.), 3 R. R. R. 875, 26 Am. & Eng. R. Cas., N. S., 875 (care required of licensee walking on railroad track); *Chicago & E. R. Co. v. Shaw* (C. C. A.), 4 R. R. R. 333, 27 Am. & Eng. R. Cas., N. S., 333 (employee of grain shipper while superintending loading, injured by reason of his contributory negligence in stepping between cars); *Louisville & N. R. Co. v. McClish* (C. C. A.), 3 R. R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942 (question of contributory negligence of person killed while walking on track not affected by custom of public to use track as foot-path); note, 20 Am. & Eng. R. Cas., N. S., 396 (care required of licensee while walking at night on track); *Davis v. Boston & M. R. R.* (N. H.), 21 Am. & Eng. R. Cas., N. S., 821 (nonsuit properly ordered, because of plaintiff's contributory negligence, notwithstanding defendant's negligence, in action for injury sustained by one at station merely for his own convenience); *Chattanooga, etc., Ry. Co. v. Downs* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 493 (contributory negligence in stepping on track in depot grounds).

†See foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-note appended to *Texas Cent. R. Co. v. Harbison* (Tex.), 16 R. R. R. 770, 39 Am. & Eng. R. Cas., N. S., 770; *Bachant v. Boston & M. R. R.* (Mass.), 16 R. R. R. 677, 39 Am. & Eng. R. Cas., N. S., 677.

Colorado & S. Ry. Co. v. Sonne

Action by Peter Sonne against the Colorado & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied. November 6, 1905.

Upon the 7th day of September, 1899, appellant, who was defendant below, operated and maintained a railroad and switchyard at Black Hawk, in the county of Gilpin, in this state. Peter Sonne, the appellee, who was plaintiff below, was a teamster living at Central City, and had been driving a team at Black Hawk and vicinity, and frequenting the switch yards of appellant for 18 or 19 years. He was well acquainted with the manner of the conducting of appellant's business in and about the operation of its trains at that point. Upon the morning in question a freight train arrived in Black Hawk, and was engaged in switching up the track west of the depot. Appellee visited the switch yards of appellant that morning for the purpose of obtaining coal from a car standing therein. A passenger train arrived from the east upon its way to Central City, and, as usual, halted at the Black Hawks station. Having ascertained the location of the coal car which he desired to empty, appellee got into his wagon, and drove parallel with the track and toward Central City in the direction in which the switching was being done by the freight engine. He had some conversation with the engineer of the passenger train, and attempted to cross the track in front of the passenger engine, without looking or listening to determine what was being done to the westward and up the track by the freight engine. As he was driving upon the track his attention was attracted by the cries of alarm of the bystanders. He then, for the first time, looked up the track, and discovered a loose car coming rapidly toward him, and but a rod or two distant. This car struck the wagon, throwing appellee to the ground and severely injuring him. He brought suit in the district court, and recovered judgment, from which judgment defendant below appeals.

Dines & Whitted and *O. L. Dines*, for appellant.

J. McD. Livesay, for appellee.

BAILEY, J. (after stating the facts). There are many questions raised in the record of this case, only one of which we shall consider, because it is decisive, and that is the matter of the contributory negligence of the appellee. We are often confronted with the proposition that because the trial court gave judgment to the successful party it should be decisive of the matter. If this be true, the existence of a court of review is superfluous, and an unnecessary extravagance. The judgment of nisi prius courts should be sustained when it can be done without violating the settled principles of law. The judgment in this case can only be sustained on the theory that the defendant is guilty of negligence in permitting the car to run down its track unattended by a locomotive, and that plaintiff was not guilty of such negli-

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gence as contributed to produce the injury complained of. Before he can recover there must be a concurrence of negligence on the part of the defendant, and a lack of negligence on the part of the plaintiff.

One of the well-settled principles of law in this state is that when a party so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such lack of care and prudence the injury would not have been sustained, he is not entitled to recover. *Colo. Central R. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118. In this case, while there is evidence that the view was obstructed some distance south of the track by a lime house, which was located about twenty-five feet from the track, and by a pile of cord wood extending out from the lime house about 8 feet, which would obstruct the view of a person who was south of the track, and opposite this building, Sonne was driving close to the track, and parallel with it, and his view was unobstructed because there were 16 feet of open space between the wood pile and the track. If he had looked he could have observed the cars upon the track for some distance. He says, however, that he did not look; that it was not customary for him to look up the track before he came upon it; that he generally looked straight ahead; that it was not his custom to stop, or to look, or to listen. One cannot rush blindly into danger, even though the danger be occasioned by the negligence of another, and be heard to complain of his injury. He is bound to exercise a reasonable degree of prudence in protecting himself from injury. The duty of self-preservation is one that cannot be ignored. Usually questions of negligence and contributory negligence are matters of fact to be determined by the jury, but where the facts are undisputed, it becomes the duty of the court to determine these questions as a matter of law. *C. B. & Q. R. Co. v. McGraw*, 22 Colo. 363, 45 Pac. 383.

This plaintiff was an old resident of Central City. He was a teamster and for a long time had been using this particular crossing. He knew the grade of the tracks and knew that there was switching being done above him, and if, with his experience and knowledge of existing conditions, he saw fit to drive across the tracks without as much as giving a passing glance in the direction from which the car came, it must be concluded that he assumed the risk, and cannot now be heard to complain if his assumption resulted disastrously. He cannot relieve himself of responsibility by the fact that it was not his custom to stop, or to look, or to listen, while approaching the track. If the accident was caused partly by the plaintiff's own negligence, then it was not in a legal sense caused by the negligence of defendant. In such case it was caused by the negligence of both parties. If the result was produced by the commingling of the negligence of the two parties, the plaintiff cannot recover. *Lesan v. Maine Central R. R. Co.*, 77 Me. 85. The conduct of the plaintiff seems well-nigh indefensible. Though he was well acquainted with the yards and

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knew that an engine and force of men were doing some switching up the track, he drove boldly upon the crossing without either looking or listening for approaching cars. The fact that there was a locomotive standing upon the track east of the crossing did not excuse him from the duty of looking west along the track. It is said that it would have been of no use to have looked westward because of the obstruction caused by the lime house and the wood pile. As has been seen, this obstruction was 16 feet from the railroad track, and plaintiff was driving close to the track, so that his view could not have been obstructed; but, even if it was, it was his duty then to stop and to listen. *C. & S. Ry. Co. v. Thomas (Colo.)*, 81 Pac. 801. The noise of this car was heard by Grutzmacher, who was working in a boiler shop 30 or 35 feet from the main track, and by Kruse, who was near the depot, 75 feet further from the car than Sonne. When the attention of Kruse was attracted by the noise and he saw the car, it was 125 or 150 feet above the wagon crossing, and apparently Sonne would have had no difficulty in seeing or hearing this car if he had made an effort to do so. These bystanders, who were not in as good a position to see or hear the car as Sonne, did hear it and did see it, and endeavored to attract Sonne's attention to the fact of its approach, but evidently failed to do so in time to prevent the injury.

We may assume it to be true that plaintiff was upon the grounds of the defendant upon lawful business, and, in a sense, upon the invitation of the defendant, and that defendant owed him the duty to have its premises in a reasonably safe condition and to prevent damage to him from any unseen or unusual danger, yet this would not relieve the plaintiff from the duty of exercising a reasonable degree of care. The obligation of the railroad company did not require it to make the place absolutely safe. It was not required to make accidents impossible. *Wabash, St. Louis & Pac. Ry. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193. The plaintiff was bound to co-operate with defendant and use ordinary care to prevent the accident. The law is no less stringent and exacting in imposing duties and responsibilities upon travelers or those crossing railways than it is upon the companies operating the roads. While it is the duty of the company to use due care and to exercise caution to prevent an injury to the wayfarer, it is equally the duty of the individual to use due care and to exercise caution to prevent his being injured by the company. Hence, it is said that, "as a matter of law, it is negligence and carelessness for a person to go, to stand, or to be upon the track of the railroad without keeping watch both ways for cars," and that it is the duty of the traveler to look, and to listen for the approach of trains, and observe the surroundings. *Denver & R. G. R. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79.

The plaintiff was guilty of contributory negligence. He failed either to look or to listen for approaching danger while in a position in which he knew, or should have known, that danger

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was imminent. He is therefore not entitled to recover, and the judgment of the district court will be reversed.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

STOKES' ADM'X v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, Jan. 18, 1906.)

[52 S. E. Rep. 855.]

Railroads—Accidents at Crossings—Evidence—Admissibility.*—In an action against a railway company for the death of a traveler at a railroad crossing, evidence relating to the crossing of a wagon in front of a freight train more than 30 years before, as to the time it required a wagon and team different from that used by decedent to go over the track at the crossing, and as to the speed of another train, was inadmissible.

Same.—In an action against a railway company for injuries at a crossing, the question whether or not the company's right of way at or near the crossing had on it undergrowth which prevented the traveler from seeing the approaching train was material.

Appeal—Harmless Error—Exclusion of Evidence.—Where, in an action against a railway company for injuries at a crossing, a witness testified that he did not know the condition of the right of way at the time of the accident, and that when he went there five hours after the accident, which occurred at 5 p. m., it was dark, the refusal to permit the witness to state the condition of the right of way at the crossing five hours after the accident was not prejudicial; it being clear that the witness had stated that he did not know what the condition of the right of way was at the time.

Railroads—Accidents at Crossings—Contributory Negligence.†—Where the proximate cause of a collision with a train at a crossing was the contributory negligence of the traveler, the question of the negligent management of the train was immaterial.

Same—Duty to Look and Listen.‡—It is the duty of a traveler on

*As to the admissibility of experimental evidence in negligence cases, see extensive note appended to *Louisville Ry. Co. v. Hoskins* (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484.

†For the authorities in this series on the question of the combined effect of negligence and contributory negligence, in actions to recover for injuries sustained at railroad crossings, see notes appended to *Cowen v. Dietrick* (Md.), 17 R. R. R. 359, 40 Am. & Eng. R. Cas., N. S., 359; *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; foot-note appended to *Feitl v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798.

‡For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-note appended to *Greenawaldt v. Lake Shore, etc., Ry. Co.* (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *St. Louis, etc., Ry. Co. v. Johnson* (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-notes appended to *Louisville & N. R. Co. v. Bryant* (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

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a highway to look and listen for the approach of trains before going on a railroad crossing, when his looking and listening would be necessarily effective.

Same—Evidence—Sufficiency.—Evidence, in an action against a railway company for the death of a traveler in a collision with a train at a crossing, examined, and held to show that decedent was guilty of contributory negligence precluding a recovery.

Error to Circuit Court, Lunenburg County.

Action by W. H. Stokes' administratrix against the Southern Railway Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

Rehearing denied March 9, 1906.

G. S. Wing, for plaintiff in error.

Munford, Hunton, Williams & Anderson, for defendant in error.

BUCHANAN, J. This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate by the Southern Railway Company.

Upon the trial of the cause the defendant company demurred to the evidence. Its demurrer was sustained, and a judgment rendered in its favor. To that judgment this writ of error was awarded.

It appears that about 5 o'clock on the 22d day of August, 1903, a south-bound passenger train of the defendant company ran upon the plaintiff's intestate, W. H. Stokes, who was crossing its tracks at a highway grade crossing near Meherrin, in the county of Lunenburg; in a twohorse wagon loaded with wheat, killing him and his two mules, and destroying his wagon.

The contention of the plaintiff is that the proximate cause of the accident was the failure of the defendant to cause the whistle on its engine to be blown for the crossing, as required by statute, and the running of its train, which was behind time, at an unusually rapid rate of speed.

The defendant claims that the crossing signal was blown, and that the train was not running in excess of 40 miles an hour, its shedule rate; and insists that, even if it was guilty of negligence in the management of its train, the proximate cause of the accident was the failure of the decedent to exercise due care before going upon its track.

The plaintiff took five bills of exceptions to the action of the court in refusing to permit her to introduce certain evidence, all of which, except the first, are relied on here as grounds for reversing the judgment complained of.

The assignments of error based upon bills of exceptions 2, 4, and 5 are without merit. The evidence objected to was clearly inadmissible. One relating to the crossing of a wagon in front of a freight train more than 30 years before; another to the time it required a different wagon and team to go over the track of the defendant at the crossing; and the third to the speed of another train going in the opposite direction.

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It appears from bill of exceptions No. 3 that the plaintiff wished to ask Eddie Owen, one of her witnesses, if he knew the condition of the defendant's right of way at the crossing five hours after the accident occurred, stating that she expected to prove by the witness that the view from the crossing was obstructed by undergrowth on the right of way. The court refused to allow the question to be asked.

Whether or not the defendant's right of way at or near the crossing had upon it undergrowth which would have prevented the plaintiff's intestate from seeing the approach of the train, which caused his death, was a material question. The trial court so thought, as it permitted both the plaintiff and defendant to introduce witnesses to prove the condition of the right of way at that point prior and subsequent to the accident. The bill of exceptions discloses no reason why the court declined to permit the question we are now considering to be asked; but another bill of exceptions, to which it refers, shows that the witness had already stated that he did not know the condition of the right of way at the time of the accident, and that when he went there five hours afterwards (the accident occurred about 5 o'clock p. m.) it was dark.

While it would have been better to have permitted the question to be asked, no prejudice resulted to the plaintiff from the court's action, since it is clear from what the witness had already testified that he did not know what the condition of the right of way was at the time designated in the question.

This brings us to consideration of the case upon the demurrer to the evidence.

In the view we take of the case, it is unnecessary to determine whether or not the defendant was guilty of negligence in the management of its train, as charged in the declaration. For, if it was, the proximate cause of the accident, as shown by the evidence, was the contributory negligence of the plaintiff's intestate.

The crossing is a dangerous one, and Mr. Stokes, who lived in the neighborhood and was on his way to mill, knew this. The county road crosses the railway track a little obliquely, in a cut which extends some distance both north and south of the crossing. The bank or side of the cut, which is about 25 feet from the center of the railway track at the point where the highway crosses the railway, was originally about seven feet deep. Five or six years prior to the accident it had been cut down or lowered about two feet by the defendant, for a distance of about 65 feet along the highway and about 75 feet along the railway in the direction from which the train came. There were only three eye-witnesses to the accident. A boy about 12 years of age, a witness for the plaintiff, who was riding in the wagon with Mr. Stokes, testified that, when they reached a point in the highway about 200 feet from the crossing, "I told him I thought that I heard a roaring, and he stopped, and just as he started off he said the train was going the other way, and we drove off down to the

Stokes' Adm'x v. Southern Ry. Co

crossing, and just as the mules' front feet got over the rail the train was right there. Then he commenced to whip the mules to get across, and I jumped off." The witness further testified that he was sitting on the seat in the wagon with Mr. Stokes and on his right side.

The engineer in charge of the locomotive, who was introduced by the defendant, testified that, as his train approached the crossing "a short distance south of Meherrin, when I got within about 100 yards or 150 yards, * * * I saw a mule team, two-horse wagon with two mules to it, being driven by a white gentleman—I did not know who he was—sitting in the wagon driving them. He looked at me. I saw him, and I commenced blowing the steam whistle, * * * and he commenced whipping his team up to cross over ahead of me. Consequently he got his mules just about across the track, and the fore wheels of the wagon were just pulling up on the rail, when the engine struck him." The engineer further testified that he put on the emergency brakes and did everything he could to stop the train; but when he first saw the mules they were about 25 or 30 feet from the track.

The other eyewitness, also put on the stand by the defendant, was a girl who was sitting at a window in a house about 80 yards from, and in full view of, the crossing as Mr. Stokes approached it. She testified that when she first saw the wagon it was about 35 steps from the crossing, a little back of where the "cut-off" was; that he was whipping his team when she first saw him, that at the time she had heard the rattle of the train and seen the smoke from it.

An approaching train could not be seen from the point 200 feet from the railway track where Mr. Stokes stopped his wagon, nor could it be seen until he reached the "cut-off," 65 feet from the crossing, at which point he could see along the railway 75 feet.

The defendant's evidence shows, by actual measurements made, and views taken, some time after the accident, that an approaching train could be seen 287 feet, when within 50 feet of the crossing; 665 feet, when within 32 feet of it; and 1,528 feet, when within 25 feet. But the plaintiff's evidence tends to show that, on account of weeds and small undergrowth growing on the "cut-off" at the time of the accident, an approaching train could not be seen more than 75 feet from the crossing until a point 30 feet from it was reached, when an approaching train could be seen a short distance—how far is not shown.

The uncontradicted evidence of the engineer is that, when within 100 or 150 yards of the crossing, he saw Mr. Stokes and his team when the mules were about 25 or 30 feet from the track, and that Mr. Stokes looked at or toward him. If Mr. Stokes saw the approaching train as the engineer testifies, then it was clearly his duty to have kept off the railway track. If he did not see the approaching train, he could have seen it if he had been in the exercise of due care. The track itself was a procla-

Barry v. Kansas City, etc., Ry. Co

mation of danger, and it was his duty, before going upon it, to use his eyes and ears—to look and listen—and to do so when and where his looking and listening would be reasonably effective. Johnson's Adm'r v. C. & C. Ry. Co., 91 Va. 171, 21 S. E. 238; Washington, etc., Ry. Co. v. Lacey, 94 Va. 460, 475, 476, 26 S. E. 834; 2 Sheer. & Red. on Neg., §§ 476, 478. He had no right to conclude, as he seems to have done, that the "roaring" heard 200 feet away from the track was made by a train going away from, instead of coming toward, the crossing. He had crossed the railway track more than a mile from and north of the crossing, and had traveled along the highway, the general direction of which was parallel with the railway and not far from it. It is not pretended that any train passed either way during that time. Having been warned by the "roaring" of a train, which he had no right to believe had passed, he ought to have been the more careful before going upon the track.

The little boy sitting in the wagon by Mr. Stokes testified that as the wagon approached the track from the point where they halted he looked and listened; in what direction he looked he does not state. He was sitting on the seat on the side farthest from the train. His size, his position, and the direction the wagon was moving prevented him from seeing the train until it was right upon them, unless he leaned forward or backward so as to look around Mr. Stokes. It is not shown that he did this.

We are of opinion that the circuit court did not err in sustaining the defendant's demurrer to the evidence, and the judgment must be affirmed.

BARRY v. KANSAS CITY, FT. S. & M. RY. CO. *et al.*

(Supreme Court of Arkansas, Jan. 6, 1906.)

[91 S. W. Rep. 748.]

Railroads—Injury to Person on Track—Contributory Negligence—Effect.*—Evidence in an action against a railroad company for the death of a person struck by a train held to show that deceased was guilty of contributory negligence precluding a recovery, in the absence of proof that the company could by ordinary prudence have avoided the injury after discovering his peril.

Same—Evidence—Sufficiency.*—Where, in an action against a railway company for the death of a person struck by a train, there was evidence that decedent was guilty of contributory negligence, and no proof that the company had discovered his peril, but only that by

*For the authorities in this series for, or against, the "last clear chance" doctrine, see foot-note appended to McLean v. Omaha & C. B. Ry. & Bridge Co. (Neb.), 16 R. R. R. 119, 39 Am. & Eng. R. Cas., N. S., 119; foot-notes appended to St. Louis, etc., Ry. Co. v. Evans (Ark.), 16 R. R. R. 789, 39 Am. & Eng. R. Cas., N. S., 789; foot-notes appended to Louisville Ry. Co. v. Hoskins (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484; foot-notes appended to Yeaton v. Boston & M. R. R. (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160; foot-notes appended to Dean v. Oregon R. & Nav. Co. (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

Barry v. Kansas City, etc., Ry. Co

the use of ordinary care it might have discovered the peril in time to have avoided the accident, the company was not liable.

Appeal from Circuit Court, Crittenden County; Allen Hughes, Judge.

Action by Lizzie Barry, as administrator of George Allen Langdon, deceased, against the Kansas City, Ft. Scott & Memphis Railway Company and another, for death of decedent in consequence of being struck by a train. From a judgment for defendants, plaintiff appeals. Affirmed.

The undisputed facts in this case are, that the deceased boarded a passenger train of the appellant at Deckerville, without money or ticket; that he declined to pay fare and was ejected at Gilmore, which was a regular station, with a depot house and a ticket agent; that he then went around the train upon the opposite side, and by stealth climbed upon the platform of the baggage car at the front end, where he was riding with two men when seen by the front brakeman. He rode in this position until the train stopped at Big Creek for the purpose of allowing other passengers to board and leave the train. The hour was 6 p. m.; the day the 12th of November; the weather was not inclement. There was at Big Creek a clubhouse 200 yards from the station, with a walk leading thereto, and within 100 yards of the track, and six or eight houses occupied by various people. One of his companions on the platform was a white man and the other a colored man, and the white man, on being ejected, went to the clubhouse for the purpose of obtaining something to eat. The deceased was held by the brakeman, Smith, who was called by the plaintiff, until the train passed, to prevent him from getting on again. He was left standing in a safe place. He conversed with the plaintiff's witness, Aaron Jones, who said that he asked how far it was to Deckerville, and he told him that he had passed Deckerville, and that Deckerville was six miles back, whereupon deceased said he knew his business and started down the track following the train toward Memphis, carrying his grip. According to the testimony of all the witnesses, he stood up while in the passenger car, riding from Deckerville to Gilmore. He was able to run and catch the train at Gilmore. He had a bottle in his pocket and offered both the brakemen whisky, the inference being that this was for the purpose of inducing them to allow him to ride.

The brakeman, Smith, testified that he considered him safer on the ground than upon the platform. There was a depot house, either completely or partly finished, at Big Creek, and there appears to be no reason why he could not as well have obtained entertainment at the clubhouse, or at some of the houses in the vicinity, as he could at any other place upon the line of the road. Clarkton, the next station east, had a depot house, where a ticket agent sold tickets, and one residence in the vicinity. Immediately back of the clubhouse there was a public road in which he

Louisville & N. R. Co. v. Redmon's Adm'r

could have traveled, if he desired to do so. This road went parallel with the track. There was also a path by the side of the track, in which he could have walked with safety. While there was testimony tending to show that appellant was intoxicated, yet he had sufficient control of his movements to cross a trestle, over a stream of water, 30 feet high and 150 feet long. He had sufficient intelligence to know that he wished to go to Memphis without paying his fare, and he had both sufficient intelligence and control of his movements to board the train a second time, while it was in motion, and to take his position upon the platform of the baggage car, to which no door led where he would be the least likely to be observed.

Francis J. Byrne, for appellant.

C. H. Trimble, for appellees.

WOOD, J. (after stating the facts). The uncontradicted proof shows that appellant's intestate was guilty of contributory negligence, which under many decisions of this court bars recovery unless it appears that appellee could by ordinary prudence have avoided the injury after discovering his perilous situation. There is no proof that appellee had discovered the dangerous position of the deceased. The most that could be said of the proof on this point, is that appellee, by the use of ordinary care, might have observed the peril of the deceased in time to have avoided the injury. But this under our decisions will not make the company liable where the deceased was also guilty of negligence contributing to the injury. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *Railway v. Leathers*, 62 Ark. 235, 35 S. W. 216; *Railway v. Dingman*, 62 Ark. 245, 35 S. W. 219; *Railway v. Taylor*, 64 Ark. 367, 42 S. W. 831; *Street Ry. v. Johnson*, 64 Ark. 420, 42 S. W. 833; *Railway v. Townsend*, 69 Ark. 380, 63 S. W. 994; *Railway v. Evans* (Ark.) 86 S. W. 426; *Street Ry. v. Kimbrough* (Ark.) 87 S. W. 121; *Railway v. Cochran* (Ark.) 91 S. W. 747.

Affirmed.

LOUISVILLE & N. R. Co. v. REDMON'S ADM'R.

(Court of Appeals of Kentucky, March 20, 1906.)

[91 S. W. Rep. 722.]

Railroads—Personal Injuries—Trespassers—Evidence.—In an action against a railroad company for a death occurring on what it claimed as its right of way, the introduction of title papers by it was not necessary; it appearing that such right of way had been inclosed for more than 45 years.

Same.—It was not material that all the fences separating such right of way from the lands of others were not built by the company.

Same—Use of Right of Way—License.*—Where the right of way

*For the authorities in this series on the question as to who are, and are not, licensees on railroad tracks or premises, see foot-note appended to *Curtis v. Oregon R. & Nav. Co.* (Wash.), 17 R. R. R.

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the use of ordinary care it might have dis not on or parallel to an
to have avoided the accident, the compar to prevent its use by the
passing that way did not

Appeal from Circuit Court, Critt
Judge.

Action by Lizzie Barry, as a railway right of way unless
Langdon, deceased, against t^l accident. danger, could by the exercise of
phis Railway Company and plaintiff's decedent walking by the
consequence of being stru train, they were not required to an-
defendants, plaintiff app self in danger by getting on the track
ing train, but they might assume that

The undisputed fact
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Municipal Ordinance. §—Violation of a speed
ence available to plaintiff.
Failure to give customary signals on
R Cas., N. S., 377; St. Louis S. W. Ry. Co. v.
R. R. 373, 40 Am. & Eng. R. Cas., N. S., 373;
Thomas (Ill.), 17 R. R. R. 356, 40 Am. & Eng.
foot-notes appended to Hern v. Southern Pac.
R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-
Illinois Terminal R. Co. v. Mitchell (Ill.), 16 R. R.
& Eng. R. Cas., N. S., 835.

authorities in this series on the subject of the care due
and licensees on railroad tracks, see foot-notes appended
Vicksburg, etc., Ry. Co. (Miss.), 17 R. R. R. 841, 40
R. Cas., N. S., 841; Engelking v. Kansas City, etc., R.
17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; Ray
& O. R. Co. (W. Va.), 17 R. R. R. 779, 40 Am & Eng.
S., 779; foot-notes appended to Seaboard & R. R. Co.
(Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S.,
foot-notes appended to Hamlin v. Columbus & P. S. R. Co.
(Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; St. Louis
Ry. Co. v. Purcell (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng.
N. S., 779; foot-notes appended to Ayers v. Wabash R. Co.
R. Cas., 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes
(Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes
appended to Clemens v. Chicago, etc., Ry. Co. (Iowa), 16 R. R. R.
413, 39 Am. & Eng. R. Cas., N. S., 413.

For the authorities in this series on the question whether those
in charge of trains or cars have the right to assume that persons seen
on or near tracks will avoid danger, see foot-notes appended to
Seaboard & R. R. Co. v. Vaughan (Va.), 17 R. R. R. 600, 40 Am. &
Eng. R. Cas., N. S., 600; foot-notes appended to Markowitz v. Metro-
politan St. Ry. Co. (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas.,
N. S., 838; St. Louis, etc., Ry. Co. v. Evans (Ark), 16 R. R. R. 788,
39 Am. & Eng. R. Cas., N. S., 788; St. Louis S. W. Ry. Co. v.
Purcell (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S.,
779; foot-notes appended to Montgomery St. Ry. v. Rice (Ala.), 16
R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499; Woolf v. Washing-
ton Ry. & Nav. Co. (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas.,
N. S., 846.

§For the authorities in this series on the question whether the
violation of ordinance limiting the speed of trains or cars is negli-
gence, see foot-notes appended to Borneman v. Chicago, etc., Ry.
Co. (S. Dak.), 16 R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464;
foot-notes appended to Clemans v. Chicago, etc., Ry. Co. (Iowa), 16
R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

||For the authorities in this series on the question whether it is
negligence to fail to give crossing signals where the accident was not
at the crossing, see foot-notes appended to Illinois Cent. R. Co. v.
McIntosh (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738;

Louisville & N. R. Co. v. Redmon's Adm'x

was not negligence available in behalf of a trespasser killed on the right of way.

negligence—Evidence.—Evidence that plaintiff and should have known the schedule but walked along the right of way ahead of suddenly stepped on the track in front of it, negligence.

1, JJ., dissenting.

Circuit Court, Nelson County.
specially reported."

by J. R. Redmon's administratrix against the Louisville
ville Railway Company for damages for the death of
his decedent. From a judgment for plaintiff, defendant
reverses. Reversed.

Benjamin D. Warfield and Jno. S. Kelly, for appellant.

*N. W. Halstead, Morgan Yewell, F. E. Daugherty, and Greene
& Van Winkle*, for appellee.

SETTLE, J. Appellee, as administratrix of the estate of her deceased husband, J. R. Redmon, by suit in the Nelson circuit court recovered of appellant a verdict and judgment for \$2,500 damages for his death, resulting from injuries inflicted by one of its passenger trains which ran against him in the village of New Haven.

In the motion and grounds for a new trial complaint was made by appellant that numerous errors were committed to its prejudice by the lower court during the progress of the trial, and these alleged errors are relied upon on this appeal for a reversal of the judgment. Chief among them was the refusal of the court to give a peremptory instruction directing the jury to find for appellant; such instruction having been requested by it following the introduction of appellee's evidence, and again when all the evidence had been heard by the jury. We will first consider this contention. According to the evidence the deceased was struck by the train at a cattle guard over which he was attempting to cross to reach a public street of the town, the cattle guard being only a few feet from where the street or turnpike crosses appellant's railroad track. Appellant's track and the ground on either side of it belonging to its right of way is fenced from the cattle guard to the railroad bridge across Rolling Fork River; the bridge being about 700 feet from and north of the cattle guard. The fence on either side of the right of way is made to connect with the side of the bridge at its south end, so by means of the fence on each side, the bridge at one end and the cattle guard at the other, appellant's right of way from the point where deceased was struck by the train to the river is entirely inclosed. Although

Nichols v. Chicago, etc., Ry. Co. (Iowa), 14 R. R. R. 766, 37 Am. & Eng. R. Cas., N. S., 766; foot-notes appended to *Texas & P. Ry. Co. v. Shoemaker (Tex.)*, 14 R. R. R. 594, 37 Am. & Eng. R. Cas., N. S., 594; foot-notes appended to *Defrieze v. Illinois Cent. R. Co. (Iowa)*, 8 R. R. R. 69, 31 Am. & Eng. R. Cas., N. S., 69.

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on which plaintiff's decedent was killed was not on or parallel to an adjoining street, but was entirely inclosed to prevent its use by the public, its use by the public in sometimes passing that way did not amount to a license.

Same—Care Required as to Trespassers.†—There could be no recovery for the death of a trespasser on a railway right of way unless the trainmen, after discovering his danger, could by the exercise of ordinary care have prevented the accident.

Same.‡—Though trainmen saw plaintiff's decedent walking by the side of the track ahead of the train, they were not required to anticipate that he would put himself in danger by getting on the track in plain view of the approaching train, but they might assume that he knew of its approach.

Same—Rate of Speed—Municipal Ordinance.§—Violation of a speed ordinance was not negligence available to plaintiff.

Same—Failure to Signal.||—Failure to give customary signals on

377, 40 Am. & Eng. R. Cas., N. S., 377; *St. Louis S. W. Ry. Co. v. Shiflet* (Tex.), 17 R. R. R. 373, 40 Am. & Eng. R. Cas., N. S., 373; *Elgin, etc., Ry. Co. v. Thomas* (Ill.), 17 R. R. R. 356, 40 Am. & Eng. R. Cas., N. S., 356; foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-note appended to *Illinois Terminal R. Co. v. Mitchell* (Ill.), 16 R. R. R. 835, 39 Am. & Eng. R. Cas., N. S., 835.

†For the authorities in this series on the subject of the care due trespassers and licensees on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *Engelking v. Kansas City, etc., R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Ray v. Chesapeake & O. R. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Seaboard & R. R. Co. v. Vaughan* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Hamlin v. Columbus & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes appended to *Clemens v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

‡For the authorities in this series on the question whether those in charge of trains or cars have the right to assume that persons seen on or near tracks will avoid danger, see foot-notes appended to *Seaboard & R. R. Co. v. Vaughan* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *St. Louis, etc., Ry. Co. v. Evans* (Ark), 16 R. R. R. 788, 39 Am. & Eng. R. Cas., N. S., 788; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499; *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

§For the authorities in this series on the question whether the violation of ordinance limiting the speed of trains or cars is negligence, see foot-notes appended to *Borneman v. Chicago, etc., Ry. Co.* (S. Dak.), 16 R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464; foot-notes appended to *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

||For the authorities in this series on the question whether it is negligence to fail to give crossing signals where the accident was not at the crossing, see foot-notes appended to *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738;

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approaching a crossing was not negligence available in behalf of plaintiff suing for death of a trespasser killed on the right of way.

Same—Contributory Negligence—Evidence.—Evidence that plaintiff's decedent was postmaster and should have known the schedule time of regular trains, but walked along the right of way ahead of one of such trains and suddenly stepped on the track in front of it, showed contributory negligence.

Cantrill and Nunn, JJ., dissenting.

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by J. R. Redmon's administratrix against the Louisville & Nashville Railway Company for damages for the death of plaintiff's decedent. From a judgment for plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and Jno. S. Kelly, for appellant.

N. W. Halstead, Morgan Yewell, F. E. Daugherty, and Greene & Van Winkle, for appellee.

SETTLE, J. Appellee, as administratrix of the estate of her deceased husband, J. R. Redmon, by suit in the Nelson circuit court recovered of appellant a verdict and judgment for \$2,500 damages for his death, resulting from injuries inflicted by one of its passenger trains which ran against him in the village of New Haven.

In the motion and grounds for a new trial complaint was made by appellant that numerous errors were committed to its prejudice by the lower court during the progress of the trial, and these alleged errors are relied upon on this appeal for a reversal of the judgment. Chief among them was the refusal of the court to give a peremptory instruction directing the jury to find for appellant; such instruction having been requested by it following the introduction of appellee's evidence, and again when all the evidence had been heard by the jury. We will first consider this contention. According to the evidence the deceased was struck by the train at a cattle guard over which he was attempting to cross to reach a public street of the town, the cattle guard being only a few feet from where the street or turnpike crosses appellant's railroad track. Appellant's track and the ground on either side of it belonging to its right of way is fenced from the cattle guard to the railroad bridge across Rolling Fork River; the bridge being about 700 feet from and north of the cattle guard. The fence on either side of the right of way is made to connect with the side of the bridge at its south end, so by means of the fence on each side, the bridge at one end and the cattle guard at the other, appellant's right of way from the point where deceased was struck by the train to the river is entirely inclosed. Although

Nichols v. Chicago, etc., Ry. Co. (Iowa), 14 R. R. R. 766, 37 Am. & Eng. R. Cas., N. S., 766; foot-notes appended to *Texas & P. Ry. Co. v. Shoemaker (Tex.)*, 14 R. R. R. 594, 37 Am. & Eng. R. Cas., N. S., 594; foot-notes appended to *Defrieze v. Illinois Cent. R. Co. (Iowa)*, 8 R. R. R. 69, 31 Am. & Eng. R. Cas., N. S., 69.

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a part, and possibly all, of appellant's right of way between the cattle guard and the river is within the corporate limits of the town of New Haven, no part of the town, in fact, lies north of the cattle guard—that is, there are no streets on or along the sides of appellant's right of way between the cattle guard and bridge, and no houses fronting thereon, though it was in proof that persons in going to a mill on the river below the bridge sometimes passed over the cattle guard and walked through appellant's inclosure, and over its right of way, getting over the fence near the bridge, and also that pedestrians from Larue county—the line between which and Nelson county at that point is the river—frequently would cross on the bridge and enter New Haven through appellant's inclosure.

It further appears that about half an hour before deceased was injured he left his store and, passing over the cattle guard, walked up the railroad track a distance of 100 feet to his garden, which fronts appellant's right of way, and is separated therefrom by the fence. After working a while in the garden, he left it, and started toward his store, walking down appellant's right of way, not on the railroad track, but beside it, in a path that ran close to the ends of the ties. At the time deceased left the garden the train was in plain view of him, as it had then crossed the bridge, but apparently without heeding its coming he walked on ahead of it until he reached the cattle guard, and then stepped upon the track and attempted to pass over the cattle guard ahead of the train, when it was within 15 or 20 feet of him. If the deceased had no right to use the railroad track at the place and at the time he was injured, he was a trespasser, and, if a trespasser, those in charge of the train owed him no duty except to use reasonable care to prevent the train from striking or running over him after discovering his peril; upon the other hand, if, at the time of receiving his injuries, he was in the rightful use of the railroad track, those in charge of the train owed him a higher duty—that is, to use ordinary care to discover his presence, and to give such signals or warnings of the approach of the train as were reasonably necessary to inform him of the danger he would incur in walking too near the track, or in getting upon it in front of the train.

It is alleged in appellee's petition that deceased was injured while "upon or near the public road and street of the city of New Haven." According to the undisputed facts deceased was not upon a public road or street of New Haven when injured. It is true, he was at the time near a road or street of the city where it crosses the railroad track, but nevertheless on the right of way and track of appellant, which the public had no right to use, and to prevent the use of which the cattle guard was constructed. Where the streets of a town or city are occupied by the tracks of a railroad company, the railroad and the public have mutual rights, and owe to each other reciprocal duties in the exercise and protection of such rights; it being the duty of those in charge of the train in such a state of case to use ordinary care to prevent

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injury to persons in the way of the train, by slackening its speed, giving the customary signals of its approach, and keeping a constant lookout, and likewise the duty of persons using the street or railroad track over which the train has the right of passage to use the same degree of care in protecting themselves against collision with and injury from the train. But, while this is true, a railroad company may have the exclusive use of so much of its right of way within the corporate limits of a town or city as is not situated upon or immediately paralleled by streets, highways, or alleys, to the use of which the public are entitled, and especially is this true if the right of way be inclosed to prevent its use by the public.

It is argued by counsel for appellee that appellant did not exhibit title to the right of way from the cattle guard to the bridge. We do not think the introduction of title papers was necessary, as the testimony without contradiction showed that the right of way in question has been occupied by appellant's railroad track and been in its actual adverse possession continuously for more than 45 years, though not so long inclosed; nor is it material that all of the fencing separating the right of way from the adjoining lands of others was not built by appellant. The proof was conclusive that the right of way from the cattle guard to the river was completely inclosed by fences, wings, the cattle guard and bridge, and a more effective way of asserting exclusive dominion over property cannot be adopted by the owner or claimant than having it inclosed. As the right of way in question is not situated upon or adjoined by a parallel street, no houses front on it, and it is besides inclosed to prevent its use by the public, the fact that residents of New Haven often, or even habitually, used it in passing between the cattle guard and the bridge, or intermediate points, or that persons from Larue county frequently did so, whether by walking on the track or on the right of way outside of the rails, did not amount to license to so use it, or impose any greater duty upon appellant with respect to the safety of those enjoying such use; hence the testimony admitted on that point was incompetent. In *Brown's Adm'r v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, it was said by this court: "We think the better doctrine is that simple acquiescence on the part of railroad company in the use of its tracks in this way does not confer authority or right, nor amount to license so to use." *Embry v. L. & N. R. Co.*, 36 S. W. 1123, 18 Ky. Law Rep. 436. Upon the facts of the case at bar there is no escaping the conclusion that the decedent was at the time of receiving his injuries a trespasser, and this being true, there should have been no recovery of damages against appellant, unless its servants in charge of the train, after discovering the decedent's danger could, by the exercise of ordinary care, have prevented it from striking him.

Measuring the facts of this case by the above rule, let us see if there was any negligence upon the part of the trainmen. From the evidence as a whole, there can be no doubt but that the train

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whistle blew beyond the bridge, and that it again blew after crossing the bridge and before reaching an elm tree that stands between the bridge and the cattle guard; the second whistle doubtless being the signal for the crossing beyond and near the cattle guard, and probably for the New Haven depot as well. In addition to these signals, there were numerous alarm blasts of the whistle given just before and at the time deceased was struck by the train. Indeed, nearly all the witnesses in the case either saw or heard the train as it approached New Haven. There was some difference of statement among them as to when, where, and how often the train whistled, but practically none as to the fact that it signaled more than once as it approached. We do not think there can be any doubt from the testimony that deceased heard the signals given by the train and saw it as it approached, for he was in his garden, with nothing to obstruct the sound of the whistle or his view. The train arrived at New Haven on its schedule time; it was a regular train, and deceased, being postmaster, knew when it was due. Besides, according to the evidence, when the train whistle blew beyond and near the bridge he quit his work in the garden, climbed upon the fence that separated his garden from appellant's right of way, sat there until the train crossed the bridge in plain view of him, then got down and walked down appellant's right of way beside the track toward the cattle guard, upon reaching which he for the first time stepped or was in the act of stepping upon the track in front of the train, when it struck him, producing the injuries that caused his death. The witnesses who saw him struck by the train all agree that the deceased did not get upon the railroad track until he reached the cattle guard, down to which time he had been walking beside the track, and was in no danger from the train, and all seem to agree that when he stepped upon the cattle guard the engine was only 15 to 20 feet behind him. It also appears that, as he stepped upon the cattle guard, the whistle began to sound the alarm. The engineer and fireman then in charge of the train testified, in substance, that they saw the deceased walking down appellant's right of way ahead of the train; that he was not on the track, but walking by the side of it and at the end of the ties, until he suddenly stepped or was in the act of stepping on the cattle guard just ahead of the train, and the engine was then so close to him that the pilot passed without striking him, but some other part of the engine, or a car behind it, did strike and injure him. Obviously, under the facts presented by the record, it was impossible for those in charge of the train to have stopped it, after the deceased got upon the railroad track, in time to prevent his injuries, even though the train had been running at a slower rate of speed than it was; and also apparent that as long as he continued to walk by the side of the track and beyond the ends of the ties he was in no danger of being struck by the train; therefore, he was not in peril until he stepped on the track in front of the train, and his peril could not have been known to the trainmen until it occurred, nor could they take any steps to prevent the train from

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striking him until such peril became known to them. Though they saw deceased walking by the side of the track ahead of the train, they were not required to anticipate that he would put himself in danger by getting on the track in plain view and just ahead of the train. On the contrary, they had the right to assume that he knew the train was approaching and near by, and that he would keep off the track and out of danger.

Ward's Adm'r v. I. C. R. R. Co., 56 S. W. 807, 22 Ky. Law Rep. 191, was a case quite similar to the one at bar. Ward, while walking slowly along and near a railroad track in the depot yard at Paducah, suddenly staggered and got on the track, or so near an approaching train that it struck and injured him, causing his death. In the opinion it is said: "The circumstances of the case lead irresistibly to the conclusion that the old man did not want to go down into the ditch, and supposed he was far enough off for the train to pass him, for he turned sideways just as the train reached him, and was struck by the bumper on the arm. The proof shows that the bell of the engine was ringing; it had whistled for the street crossing about 100 yards away, and was directly in front of him, and in open daylight. The rule is well settled in this state that those in charge of a railroad train, on seeing a trespasser on the track have a right to assume that he will get out of the way, and need take no steps to stop the train, or avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself. Under this rule, on the facts of this case the peremptory instruction was properly given."

In Brown's Adm'r v. L. & N. R. R. Co., *supra*, the facts were also quite analogous to those of the case at bar. Brown was killed by a train between Broadway and Baxter avenue, in the city of Louisville, at a place much more used by pedestrians than appellee's right of way between the cattle guard and the bridge at New Haven. In the Brown Case a recovery was sought against the company for his death, on the ground that the track was much used by pedestrians, and for that reason the company owed the duty of keeping a lookout for Brown, and warning him of the approaching train. The jury, under a peremptory instruction from the lower court, found for the defendant. This court approved the giving of the peremptory instruction, and affirmed the judgment.

It is, however, argued by learned counsel for appellee that appellant's train at the time deceased was injured was running at a greater rate of speed than was proper in a town, or was allowed by the town ordinances. There was considerable conflict in the evidence as to the rate of speed at which the train was going; some of appellee's witnesses putting it at from 15 to 20 miles an hour, and others at a less rate. Appellant's witnesses fixed its speed at 7 or 8 miles an hour. But we think it must have been running much slower than indicated by appellee's witnesses, for, according to the statements of practically all the witnesses, when it stopped after striking deceased, the rear coach was standing

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over the cattle guard where he was injured. It follows, therefore, that it was stopped within a distance a little less than the length of the train, which was composed of an engine, tender, baggage car, and three passenger coaches. But if it were true that the train was running faster than was permitted by the ordinances of the city of New Haven, we do not think it would show negligence. In *Ward's Adm'r v. I. C. R. R. Co.*, supra, this court, in discussing the effect of municipal ordinances in cases of this character, said: "But it is insisted that the train was running faster than the ordinances of the city allowed it to run, and that this constitutes such negligence as to make appellee liable. While there is a conflict of authority as to the effect of municipal ordinances in cases of this character, the rule is well settled in this state that such ordinances are not admissible, and that running in violation of them is not negligence." *L. & N. R. R. Co. v. Dalton*, 43 S. W. 431, 19 Ky. Law Rep. 1318; *Dolfinger v. Fishback*, 12 Bush, 474. As appellant's right of way between the cattle guard and bridge is not upon or contiguous to a parallel street, or open to the use of the public, its trainmen had the right to regulate the speed of the trains thereon as they deemed proper. In view of the foregoing authorities, it is patent that the court erred in admitting the speed ordinance of New Haven in evidence.

It is insisted for appellant that the court erred in permitting testimony as to the use made by the public of the crossing near which the accident occurred. We are of opinion that such testimony was incompetent, as the injury to deceased happened away from, though near, the crossing, and within the inclosure of appellant. While it is the duty of those in charge of trains, in approaching a public crossing, whether in a city or the country, to give the customary and necessary signals for the protection of the persons having the right to use such crossing, this duty need not be performed for the benefit of trespassers who may be using the track elsewhere. In *Shackelford's Adm'r v. L. & N. R. R. Co.*, 84 Ky. 43, 4 Am. St. Rep. 189, it is said: "Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence, but this is required for the safety of passengers, trainmen, and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere. The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the outbuildings, or vice versa; and to require the companies in all such cases to signal the approach of their trains and to presume and guard against the presence of persons upon the track would not only be unreasonable, but detrimental to public travel." In *Davis' Adm'r v. C. & O. Ry. Co.*, 75 S. W. 275, 25 Ky. Law Rep. 342, still another case very much like the one at bar, the petition alleged that plaintiff's intestate was killed "at or near the public crossing."

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In the opinion we find the following statement of the law: "From the averments the court concludes that the intestate had the right to use the private crossing, but under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed 'at or near' the crossing is equivalent to the averment that she was not killed on it, but near the crossing; hence, she was a trespasser. This being true, under the well-settled rule of this court, those in charge of the train owed her no duty except to use reasonable care to save her after discovering her peril. As she was not on a crossing when killed, it cannot be claimed that, as to the intestate, it was negligence to fail to give signals on the approach to either the private or public crossing." *L. & N. R. R. Co. v. Vittitoe's Adm'r*, 41 S. W. 269, 19 Ky. Law Rep. 612.

We do not think it was made to appear in this case that appellant's trainmen failed to give the customary signals in approaching the streets and public crossing of New Haven; but if they had not done so, it was not negligence as to the deceased, who, as repeatedly stated, was not at the time of the accident on a street or the public crossing of the town, but a trespasser on appellant's right of way and within its inclosure. In view of the failure of deceased to use ordinary care, at the time of receiving his injuries, to keep out of the way of the train, we think the conclusion inevitable that his injuries resulted from and were caused solely by his own negligence, or accident, in stepping on the railroad track in front of the train, when it was so near him that it was beyond the power of those in charge thereof to stop it in time to prevent his injuries.

Several witnesses testified that the deceased was in poor health for a year or more before his death; that in walking about he would sometimes stagger suddenly, and had even been known on one or two occasions to fall when thus affected; whether these spells were from vertigo or some other cause does not fully appear, but the most reasonable solution of his conduct in stepping on the track in front of the train is that he did so from illness and sudden weakness; but whatever the cause, it was his own act.

Being of the opinion that the peremptory instruction asked by appellant should have been given, it is unnecessary to consider others that were given or refused.

Wherefore the judgment is reversed, and cause remanded for a new trial and other proceedings consistent with this opinion.

CANTRILL and NUNN, JJ., dissent.

GORHAM *v.* MILFORD, A. & W. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 19, 1905.)

[75 N. E. Rep. 634.]

Street Railroads—Injuries to Person on Track—Contributory Negligence—Evidence.—Evidence in an action against a street railroad

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company for the death of a person who was struck by a street car examined, and held not to prove decedent's freedom from contributory negligence, notwithstanding the motorman's negligence just before the accident.

Same—Burden of Proof.*—In an action against a street railroad company for the death of a person who was struck by a car, plaintiff has the burden of proving that decedent was in the exercise of ordinary care, though the motorman was negligent just before the accident.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Bridget Gorham, administratrix, against the Milford, Attleboro & Woonsocket Street Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

J. B. Ratigan and J. E. Swift, for plaintiff.

W. Williams, J. C. F. Wheelock, and G. B. Williams, for defendant.

KNOWLTON, C. J. The plaintiff's intestate, while walking along a road in the evening, was run over and killed by one of the defendant's electric cars. We will assume, in favor of the plaintiff, that there was evidence from which the jury might have found that the motorman was negligent just before the accident in being engaged in conversation with a passenger who sat near him on the front seat. The question before us is whether there was any evidence that the plaintiff's intestate was in the exercise of due care. He was familiar with the road on which the car was running, and he knew of the existence of the track and the use of it by electric cars. There was no sidewalk, and no regular path on the road. The track was on the right-hand side of the road as the plaintiff's intestate was facing, and the wrought portion, where pedestrians and ordinary vehicles were accustomed to pass, was on the left. The evening was dark, and the car carried a headlight and other lights, which were said by some of the witnesses to be dim. When last seen, a short time before the accident, the plaintiff's intestate was walking on the left of the track, about 2 feet from it. Although, according to the testimony, he had three drinks of beer that evening, witnesses who saw him testified that he was perfectly sober. The last witness who saw him before he was struck was called by the plaintiff, and testified that he met him in the road and had a short conversation with him, and then passed on, leaving him walking in the opposite direction, about 2 feet from the track. He also

*For the authorities in this series on the question whether there is a presumption of the exercise of due care by a person killed by a train or car, see foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; *Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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testified that the coming car was "plain to be heard" at that time, and that he afterwards walked on about 150 feet from the place where he met the deceased, and there met the car going at the rate of 12 or 15 miles an hour in the same direction as the deceased.

In regard to the conduct of the plaintiff's intestate after he parted from this witness, we have no evidence. There is nothing to show that he was in the exercise of due care. If he was reasonably attentive to what was going on, and thoughtful of the dangers of the situation, it would seem that he easily could have kept out of the way of the car. We should expect him to hear and see the approaching car. There was plenty of room for him to stand or walk in safety. If he was walking in the same line where the witness last saw him, a step to the left would have put him out of danger. The burden was upon the plaintiff to prove that her intestate was in the exercise of due care, and the judge rightly ruled that this burden was not sustained. *Cox v. South Shore, etc., Railway Company*, 182 Mass. 497, 65 N. E. 823; *Dooley v. Greenfield, etc., Street Railway Company*, 184 Mass. 204, 68 N. E. 203; *Mathes v. Lowell, etc., Street Company*, 177 Mass. 416-420, 59 N. E. 77; *Gleason v. Worcester Consolidated Street Railway Company*, 184 Mass. 290, 68 N. E. 225; *Itzkowitz v. Boston Elevated Railway Company*, 186 Mass. 143, 71 N. E. 298.

Exceptions overruled.

MOBILE & O. R. CO. v. MATTHEWS.

(Supreme Court of Tennessee, Jan. 29, 1906.)

[91 S. W. Rep. 194.]

Action—Joinder of Causes of Action.*—Two or more distinct causes of action may be joined in as many counts of the same declaration, where the different counts are of the same quality or character and are not repugnant to each other.

Same—Single Cause of Action.*—Injuries sustained in plaintiff's person and in his property in a single collision with a railroad train give rise to but one cause of action, and damages for both classes of injuries must be recovered in a single suit.

*For the authorities in this series on the subject of joinder of causes of action, see *McHugh v. St. Louis Transit Co. (Mo.)*, 17 R. R. R. 349, 40 Am. & Eng. R. Cas., N. S., 349 (cause of action for damages at common law for negligence cannot be joined in same court with one for statutory negligence, under Mo. Rev. St. 1899, § 593); *Louisville & N. Terminal Co. v. Lellyett (Tenn.)*, 15 R. R. R. 498, 38 Am. & Eng. R. Cas., N. S., 498 (in action for injuries to use of property from maintenance of terminal yard, declaration was not objectionable for misjoinder of causes of action for injury to health of plaintiff's wife and children); *Fisher v. Seaboard Air Line Ry. Co. (Va.)*, 15 R. R. R. 683, 38 Am. & Eng. R. Cas., N. S., 683 (where plaintiff claimed damages for injuries to his tenement by reason of the negligence of railroad company in tearing down an adjoining tenement belonging to it to make room for its tracks, and for injuries from

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Appeal from Circuit Court, Obion County; R. E. Maiden, Judge.

Action by W. R. C. Matthews against the Mobile & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Swiggart & Spradlin and *C. G. Bond*, for appellant.

Lannom & Stanfield and *Felix W. Moore*, for appellee.

SHIELDS, J. Plaintiff, Matthews, sued for injuries sustained in his person and property, a buggy and horse, in a collision with one of the defendant's trains at a road crossing, in separate counts in one declaration. The defendant moved to strike the declaration from the file for duplicity, in that the claims for damages to the person and property constituted two distinct causes of action, in which the elements and measure of damages were different, and could not be joined in the same suit. This motion was overruled, and there was judgment for the plaintiff. Defendant has appealed, and assigned the action of the court on its motion, among other things, as error.

The contention of the plaintiff in error is not sound. If the declaration embraced two distinct causes of action, as insisted, it would not be subject to the objection made to it. As said by this court in *Bible v. Palmer*, 95 Tenn. 393, 32 S. W. 249: "It is allowable to join two or more distinct causes of action in as many different counts of the same declaration, when, as in this case, the different counts are of the same quality or character, and not repugnant or antagonistic to each other. And in such cases the court may direct a separate verdict upon each count, or separate trials."

But in this case there is but one cause of action sued upon. The negligent action of the plaintiff in error constituted but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiffs, and vexatious

smoke, noise, etc., resulting from negligent operation of railroad, such causes of action were of the same nature, and could be joined in the same declaration); *Southern Ry. Co. v. Horner* (Ga.), 3 R. R. R. 47, 26 Am. & Eng. R. Cas., N. S., 47 (whether joinder of action ex delicto with statutory action (against carrier of freight) constitutes joinder of action ex contractu with action ex delicto); *McVey v. Illinois Cent. R. Co.* (Miss.), 3 Am. & Eng. R. Cas., N. S., 371 (the right of action which survives to the personal representatives of deceased, for his personal injuries, under certain statutory and constitutional provisions of Mississippi, is entirely distinct from the right of action given to the next of kin by § 1510, Code 1880, § 663, Code 1892; and the two causes cannot be joined).

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litigation against defendants. If necessary to prevent confusion in ascertaining the damages to be recovered for different injuries, separate verdicts may be directed. 2 Chitty's Plead. 850, 860, 910; *Howe v. Peckham*, 10 Barb. (N. Y.) 656; *Hemstead v. Des Moines*, 63 Iowa, 39, 18 N. W. 676; *Shoemaker v. Atkins*, 11 Heisk. 296; *Smith v. Atkins*, 6 Baxt. 318.

Indeed, if the plaintiff fail to sue for the entire damage done him by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried. *Southern Ry. Co. v. Brigman*, 95 Tenn. 628, 32 S. W. 762; *Freeman on Judgments*, § 241; *Carraway v. Burton*, 4 Humph. 108.

Other assignments of error were overruled in an oral opinion. Judgment affirmed.

LOUISVILLE, H. & ST. L. R. CO. *v.* HATHAWAY'S EX'X.

(Court of Appeals of Kentucky, Dec. 16, 1905.)

[89 S. W. Rep. 724.]

Railroads—Persons on Track—Negligence—Care Required.—Where the conductor and brakeman of a freight train were watching a man lying on the track, they not being certain as to the character of the object, and the brakeman remarked that it looked like a man, the conductor was not negligent in not immediately giving a signal to stop; he not having himself discovered the nature of the object.

Same—Duty to Trespassers.*—Operatives of a railroad train owe no lookout duty to a trespasser on the right of way.

Same—Persons Near Track.†—Where the operatives of a railroad

*For the authorities in this series on the subject of the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *Engelking v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ray v. Chesapeake & O. Ry. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Seaboard & R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes appended to *Clemans v. Chicago, etc., Ry. Co.* (Iowa.), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

†For the authorities in this series on the question whether those in charge of trains or cars have the right to assume that persons seen on or near tracks will avoid danger, see foot-notes appended to *Seaboard & R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *St. Louis, etc., Ry. Co. v. Evans* (Ark.), 16 R. R. R. 788, 39 Am. & Eng. R. Cas., N. S., 788; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499.

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train saw a man lying beside the track, they were not negligent in failing to stop the train in anticipation that he would place his arm upon the rail before the train reached him.

Nunn, J., dissenting in part.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Albert C. Hathaway's executrix against the Louisville, Henderson & St. Louis Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Helm, Bruce & Helm, for appellant.

Edward F. W. Kaiser, J. W. S. Clements, and Rowan Hardin, for appellee.

BARKER, J. This action was instituted in the Jefferson circuit court to recover damages for the death of Albert C. Hathaway, caused, as is alleged, by the negligence of the appellant railroad company in running over and cutting off his arm, from which injury he died. The answer controverted the material facts of the petition and alleged contributory negligence, which was denied by reply, thus completing the issues in the case. A trial by a jury resulted in a verdict of \$3,000 in favor of the appellee, of which the corporation is now complaining.

The facts are these: Albert C. Hathaway, who had been discharged from an employment in Louisville, Ky., for drunkenness, went to Owensboro in search of work. While in that city he was on a protracted debauch, and seems to have left there on a train which passed at 4 o'clock a. m. on the 12th day of June, 1902. At Lewisport, as we understand the record, he left the train, presumably because he had not sufficient money to pay his way further. At the latter place he undertook to, and did, raise a small amount of money upon the plea of being a Mason in distress. He was told, however, that at Hawesville, a town some 10 miles distant, there were quite a number of Masons, and if he would go there he could probably obtain more substantial assistance. This he endeavored to do by walking along the track of the defendant railroad. While en route, at one of the stations, he stopped and obtained water to drink. His nerves were very much unstrung, and the section boss who gave him the water advised him not to walk further, but to rest in the shade, as it was very hot. This he declined to do, and continued on his way. When within about 2½ miles of Hawesville he seems to have fallen, and lay beside the track his feet somewhat out from the roadbed, near or in some weeds which grew there; his head lying between the ends of the cross-ties, but outside the rail. His hat, which had fallen from his head, was on the track between the rails. Between 1 and 2 o'clock in the day a train of cars loaded with gravel was being backed from the company's gravel pits towards the point where Hathaway was lying. The conductor and colored brakeman were on the caboose, keeping a

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lookout. The train was running at a rate of about 15 miles an hour. When within about 150 yards of where Hathaway was lying, both the conductor and the brakeman observed him, but did not know that it was a man, or what it really was. They watched the object intently, however, and when they got within four or five car lengths of the decedent they recognized the object to be a man. Instantly the emergency signal was given by the conductor, and it is not denied that from that time on everything that could be done to stop the train was done, and that it was stopped within as short a space as was possible. As the decedent lay, he was in no actual danger from the cars, and had he remained quiet the train would have passed him without injury; but about the time the caboose, which, as said before, was the forward end of the train, got within 30 feet of him, he spasmodically, as it appears, threw his arm across the track, and it was crushed off by the wheels of the caboose. The train was stopped after the caboose and the second car had passed the point where he lay. The conductor sprang to the ground, and went to the injured man's assistance, who had by this time arisen from where he lay, and when the conductor approached him he grasped that officer with his uninjured arm, and tried to speak, but could only mumble incoherently. He was frothing at the mouth, and his face much flushed. The conductor at once placed him in the caboose, and the train was backed to the gravel pits, where the company maintained a telegraph station, and a message sent to Cloverport to have a surgeon at the depot when the train reached there, and then the wounded man was carried to Cloverport, where he was placed in charge of Dr. A. A. Simmons, a surgeon of the defendant company; but he was in extremis and died five minutes after. There was little or no hemorrhage from the wound; the ends of the arteries being mashed together by the wheels so as to staunch the flow of blood. The appellee, after proving by her own testimony her appointment and qualification as administratrix, introduced the colored brakeman as to the material facts of the accident, and then rested her case, whereupon the appellant moved for a peremptory instruction in its favor which was overruled by the court. It then introduced its evidence, showing the facts we have detailed about the drunkenness of the decedent, his physical condition, and his undertaking to walk to Hawesville along the line of its track. It also introduced its conductor and engineer, who testified as to the discovery of the decedent lying near the track, and that everything that could be done to stop the train in time to save him was done. Dr. Simmons testified as to the patient's condition when he arrived at Cloverport, and his death, and also gave it as his opinion that he died, not from the shock of having his arm crushed off, but from sunstroke, apoplexy, or alcoholism, or a combination of these.

The conclusion we have reached as to the merits of the motion for a peremptory instruction renders it unnecessary for us to discuss any other question in the case. Appellee's witness, James Dean, who was the brakeman on the train at the time

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the injury was inflicted, states all of the evidence on the merits of her claim for damages. As it must be admitted that at the best there is only a scintilla of evidence of negligence, and that this scintilla must be deduced from the testimony of James Dean, we will set forth accurately what this witness said. In response to the question, "I will get you to state to the jury how it [the injury] happened," he said: "Well, he was laying near the track when we seen him, when I seen him, and we were backing up pretty sharply, and when I first discovered him I could not well tell what it was, whether it was a man, or a bunch of weeds, or what. The weeds was a little high there where he was laying at the time. When we first seen him, I reckon it was something near one hundred or fifty yards when I first discovered him; something near that as near as I can tell. After getting close to him I discovered it was a man. The conductor asked me what it was at first, and I told him I didn't really know what it was, and after getting closer I says to him, 'It looks like a man,' and after we got within about I couldn't exactly tell how close I could see it was a man, and I told him it was a man. Of course, then, he signed the engineer down, and after I told him it was a man, and he could see it was a man, I suppose he signed him down, and we ran about a couple of cars over him. Q. At the time you saw this object and told the conductor that you thought it was a man, could the train have been stopped in order to avoid running over this man at that time? A. Not at that time. Q. I am speaking of the time you saw this object on the track and you told the conductor about it. Now, if the conductor would have made any attempt to stop the train, could the engineer have stopped the train at that time? A. Well, I don't know whether he could or not exactly. I could not tell you how quick he could stop—nothing like that. Q. How far did the car run after you had told the conductor that you thought it was a man before he tried to stop the car—before the conductor tried to stop the car? A. I don't know exactly how far it ran. Q. About how far? A. Well, I could not tell exactly how far. Q. Had he gone three car lengths or four car lengths? A. Yes, sir; I guess he had, as much as three. Q. Had he gone as much as four or five car lengths? A. I could not tell exactly whether it was that much or not. Q. Who saw the object first? A. The conductor seen it first. Q. Before you did? A. Yes, sir. Q. What did he say about it? A. The conductor asked me what was it on the track, and then I looked, and I says to him, 'I don't know exactly what it is,' and he says, 'It looks like a bunch of weeds.' He says, 'It is a bunch of weeds,' or 'what is it?' That is what he said. Q. Did the conductor make any attempt to stop the train after he saw the object on the track at that time? A. Not at that time; no, sir. Q. How far did he run the train from the time the conductor first saw the object on the track and before he tried to stop the train? A. He didn't run very far. I don't know exactly how far it was. Q. Well, about how far? A. Oh, it was about, I reckon, as much as four or five car lengths, I guess. Q. Before he ever tried to

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stop the train? A. Before he could tell what it was. Q. How far was you away from him when you could tell it was a man? A. It was about, I guess, something near three or four car lengths." On cross-examination the following questions and answers were given: "Q. You have said that the conductor signaled the engineer when he found out it was a man? A. Yes, sir. Q. Do you know enough about railroading to know what kind of a signal that was he gave, whether it was an ordinary stop signal, or emergency signal? A. Well, yes, sir; it was for a quick stop. Q. Did you feel the engineer apply the brakes? A. Yes, sir. Q. Have you had enough railroad experience to know whether that was a quick stop he made? A. Oh, yes, sir; he made a good stop. Q. How long after the conductor passed the signal to the engineer before you felt the engineer commence to stop the train? A. Well, it was right away, as near as I can tell. Q. How close were you on him, if you know, when he threw his arm over the track. A. Oh, we was about a car length of him, when he throwed his arm across the track. Q. Did he make any other movement at that time? Did he move his head, or sit up, before your train got to him? A. No, sir; I never seen him sitting up."

As Hathaway was a mere trespasser upon appellant's right of way, it owed him no lookout duty whatever, and was only responsible for any injury inflicted which reasonable diligence on its part, after his peril was discovered, would have averted. The question, then, comes to this: When did the peril of the injured man become apparent to the employees of the railroad? Obviously after they knew what the object was which they saw lying near the track. That is stating the proposition more strongly for the appellee than she deserves, because it leaves out of view the fact that the actual injury which accrued to her decedent was the result of his moving his arm and placing it across the rail just as the train reached him; the evidence without contradiction showing that, as he lay when first observed, he was in no actual danger whatever, although that fact was not known to the employees of appellant in advance. Assuming, however, for the present, that as he lay he was in peril, does the evidence of Dean disclose any negligence on the part of appellant? This question was, by the trial court, made to hinge upon the fact that Dean stated that, at an appreciable time before the conductor gave the emergency signal, the witness said to him, "It looks like a man;" and it was deduced therefrom that it was for the jury to say whether it was negligence in the conductor to fail to give the emergency signal instantly upon this suggestion being made by Dean. This assumes that the conductor, who was also looking at the object, should have instantly adopted the suggestion of the brakeman Dean and acted upon it, or that he could have done so within the moment of time mentioned. This assumption is predicated upon the estimated rate of speed at which the train was running, and the supposed distance it had run between the time Dean stated, "It looks like a man," and the time when the con-

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ductor gave the emergency signal. The witnesses say the train was running at a rate of about 15 miles an hour, and Dean testifies that, within the time under consideration, it had gone as much as three car lengths. Counsel for appellee sought with great diligence to have him extend this distance, but he declined to say that, within this time, they had traversed more than the length of three cars. Now, assuming it to be true that the train was actually running at 15 miles an hour, it went 22 feet each second. The cars were said to be 34 feet in length. Three car lengths are therefore 102 feet, so that the actual time elapsing between Deans suggestion, "It looks like a man," and the giving of the emergency signal, was a little less than five seconds. But the witness stated most emphatically that the train could not be stopped in time to save Hathaway after they discovered that the object which had attracted their attention was a man. Unless the rule of law is that those in charge of a train, under circumstances such as we now have before us, must stop it every time they see an object lying near the track which looks like a man, the evidence of Dean does not show any negligence on the part of those in charge of the train in question. When we remember the long distances traversed by trains now operated in this country, and the absolute necessity of their being run on schedule time, both for the safety of the traveling public and the needs of commerce, a rule would bear exceedingly hard upon corporations which requires them to stop their trains to investigate every object lying near their tracks which "looks like a man." And especially would this be true where the object (if a man) was a mere trespasser, to whom no lookout duty was owing. The more reasonable rule, it seems to us, is that the corporation's duty to a trespasser begins when it actually discovers his peril. The conductor in this instance was not obliged to take the mere suggestion of the brakeman that "it looks like a man" as a fixed fact. He was looking at the object himself, and Dean testifies that, after he and the conductor actually discovered that it was a man, everything that was possible to be done to save him was done.

It seems to us that this case cannot be distinguished from *Goodman's Adm'r v. Louisville & Nashville Railroad Company*, 116 Ky. 900, 77 S. W. 174, 63 L. R. A. 657. In the latter case the decedent, a boy of 11 years, laid down between the rails on the track of the corporation. A train came along, traveling at the rate of from 30 to 35 miles an hour, and ran over and instantly killed him. The boy was a trespasser upon the track, and the railroad owed him no duty, except to use reasonable diligence to refrain from injuring him after his peril was discovered. When within about 150 yards of him, the fireman, who was looking out ahead, saw an object on the track which appeared to be a piece of paper; but, when the engine had approached to within 30 feet of the object, he discovered it to be the decedent. From that time on everything was done to stop the train before it ran over him. In addition to these facts, evidence was introduced which

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tended to show that it was possible for the engineer to discover the deceased in time to save him. At the close of the plaintiff's testimony, the trial court awarded the defendant a peremptory instruction to the jury to find for it. The merit of this judgment was the question on appeal, and in the opinion affirming it we said: "In broad daylight he laid down between the rails, and it certainly cannot be said that it was negligence in the engineer in charge of the train not to have discovered his position of peril at the very first moment when it might have been discovered by one who went there for the express purpose of ascertaining whether such discovery was possible. Trains must be run on schedule time, and no duty is imposed upon those in charge to stop or slow up at the appearance upon the track of objects the nature of which is only discernible upon near approach."

In the case of *Early's Adm'r v. Louisville, H. & St. L. Ry. Co.*, 115 Ky. 13, 72 S. W. 348, there was no actual witness to the killing; but the plaintiff undertook to establish negligence of the defendant corporation by showing that the track at the place where the deceased was killed was perfectly straight for a long distance, and therefrom deducing the conclusion that, had the corporation's employees exercised ordinary diligence, they could have discovered his peril in time to save him. The deceased being a trespasser upon the track at the point where he was killed, this court, in the opinion, after stating the rule as herein enunciated of the duty of the corporation to a trespasser, said: "We do not attribute to the tests made by some of the witnesses, as to the distance from which certain objects placed by them on the railroad track at the point of the accident could be seen, the importance attached to them by counsel for appellant; for we know that objects to which the attention is called in advance can more readily be seen and identified by a person stationed on the ground at a given distance than by one on a rapidly moving train, however keen his vision, or constant his outlook on the track ahead of the train. But these tests do not of themselves, or in connection with the remainder of the evidence, supply the facts from which negligence on the part of appellee may be inferred; and, being of the opinion that the lower court did not err in giving the peremptory instruction, nor in refusing the appellant a new trial, the judgment is affirmed."

The opinion in the case of *Goodman's Adm'r v. Louisville & Nashville Railroad Company*, *supra*, so thoroughly discusses and distinguishes the cases relied on by appellee to sustain the judgment of the trial court in overruling the motion for a peremptory instruction from the case at bar that we think it unnecessary to review them here. Upon the theory that appellee's decedent was in actual peril as he lay near the track at the time he was first observed, we think the evidence fails to show any negligence on the part of the corporation, under the well-settled rule of its duty to trespassers. From the time that its employees knew the object they had heretofore seen lying near the track was a man, there is no dispute that everything was done which could have

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been done to stop the train, and we do not think the appellant owed the decedent any duty prior to that time.

As a matter of fact, however, Hathaway was in no actual danger of being injured by the passing train, as was demonstrated by the fact that no part of his body was touched except his arm, which he threw across the track just before the train reached him; and there can be no question that it was impossible to stop the train in time to save his arm after he placed it across the rail. The close proximity of Hathaway to the track at the time he was discovered made the employees of the appellant believe that he was in danger, and they acted upon this theory, although, as said before, it later transpired that he was not; and the question arises on this latter phase of the case whether the employees (conceding that they saw him as he originally lay in time to stop the train, and failed to do so) were bound, at the peril of the corporation, to anticipate that a man, lying otherwise safe near the track, would deliberately place his arm upon the rail before the train reached him. It seems to us that the proximate cause of the injury which accrued to Hathaway was this last act of his in suddenly placing his arm across the rail; and if the corporation was not bound to anticipate his presence at the place of the accident (he being a trespasser), it was not bound to anticipate, after its employees saw him in a safe position with reference to the passing train, that he would immediately imperil himself by placing a part of his body in front of the approaching car. Suppose he had been seen standing so close to the track that it was impossible to tell whether he was in danger as he stood, but it was afterwards found that he was safe; must the corporation anticipate, at its peril, that he would throw himself across the track (if he afterwards did so) in front of the train? It seems to us that this question must be answered in the negative, unless we are to hold that the employees must be endowed with prescience, because it would not be reasonable to suppose that one so standing would make his seeming peril actual by throwing himself across the track. Undoubtedly, if the railroad's employees in charge of a moving train see one in apparent danger by his proximity to the track, and they fail to use ordinary diligence to save him, and the apparent peril is found to be real, and the party is injured by the negligence, the corporation will be responsible. The converse of this is equally true, and if the apparent danger in the supposed case does not exist in actuality, but the party by a change of his position makes his seeming peril real at a point in the sequence of events from which reasonable diligence would not save him, then the corporation is not liable, because the injury resulted, not from the original negligence in failing to stop the train, but from the new act of peril committed by the trespasser.

For the reasons indicated, the judgment is reversed for proceedings consistent herewith.

NUNN, J., dissents from the last half of the opinion, which relates to the decedent placing his arm on the track just before the train reached him.

BARTLETT v. WABASH R. CO.

(Supreme Court of Illinois, Feb. 21, 1906.)

[77 N. E. Rep. 96.]

Railroads—Injuries to Pedestrians—Use of Right of Way—Trespassers—Care Required.*—Where a railroad company had not authorized the use of its track as a highway between a park and a depot, a person so using the track was a trespasser, as to whom the company was only bound to abstain from wantonly and recklessly injuring him, and to exercise reasonable care to avoid such injury after discovering him in a perilous situation.

Same—Willful Injuries.—In an action for injury to trespasser on track, evidence held insufficient to show a willful or wanton injury.

Trial—Direction of Verdict.—Where, in an action for the alleged willful and reckless killing of a pedestrian while walking on defendant's railroad track, the admitted facts and all legitimate inferences which might be drawn therefrom in favor of plaintiff did not tend to establish his right to recover, it was proper to direct a verdict for defendant.

Error to Appellate Court, Fourth District.

Action by Charles Bartlett, as administrator, etc., against the Wabash Railroad Company. From a judgment in favor of defendant, affirmed by the Appellate Court (116 Ill. App. 67), plaintiff brings error. Affirmed.

Burton & Wheeler, for plaintiff in error.

Warnock, Williamson & Burroughs (C. N. Travous, of counsel), for defendant in error.

HAND, J. This was an action on the case, commenced by the plaintiff in the circuit court of Madison county to recover damages of the defendant for wrongfully causing the death of Benjamin Stampfer, the plaintiff's intestate. The jury, at the close of the plaintiff's evidence, under the direction of the court, returned a verdict against the plaintiff, and a judgment was rendered on the verdict in favor of the defendant, which judgment has been affirmed by the Appellate Court for the Fourth District, and the plaintiff has sued out a writ of error from this court to review the record.

The declaration contained three counts, each of which charged the defendant with having willfully and recklessly caused the death of Benjamin Stampfer. The evidence of the plaintiff tended to show that Benjamin Stampfer was killed on the 20th day of July, 1902, upon the right of way of the defendant in the city of Edwardsville. The defendant has two depots in said city—one on its main line, called the "Lower Depot," and one about two miles from the lower depot, called the "Upper Depot." The upper depot is connected with the main line by a branch road, and a "dinkey train," so called, makes frequent trips over said branch line between the upper and lower depots. Midway be-

*See preceding case and foot-note.

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tween said depots and adjoining the branch line, is situated Citizens' Park, which is used, in part, as a place where picnics are held. On the day of the accident a picnic, largely attended by people from St. Louis, was held at said park, and the defendant ran an excursion train from the city of St. Louis to the park. Benjamin Stampfer, who resided in St. Louis, purchased of the defendant in that city a round-trip ticket to the park and was a passenger on said excursion train, and intended to return to St. Louis upon said train, which left the park later in the day. He, however, did not reach the train in time to take passage thereon from the park, and, discovering the train had left the park, in company with four other persons who had also missed the train, started from the park down the branch line for the purpose of boarding the train at the lower depot. Stampfer was about 60 years of age, was short in stature and heavy built, and was not able to keep up with his fellow excursionists, who were going rapidly, but soon fell behind, and the last they saw of him he was on the branch line, in the center of the track, going in the direction of the lower depot. The "dinkey train," which consisted of a passenger coach, combination coach, and engine and tender, a short time after the departure of the excursion train from the park, started from the upper to the lower depot, running backwards; that is, the engine was on the opposite end from the direction the train was moving. One Daily, a brakeman, who was acting in the capacity of conductor on that day, was upon the front platform of the moving train. As the train passed around a curve after leaving the park, Daily and several passengers saw Stampfer hurrying along towards the lower depot in the center of the track, about 150 feet ahead of the train. As soon as Daily discovered Stampfer on the track in front of the moving train, he commenced to shout to him to get off the track. Stampfer paid no attention to the warning from Daily or the moving train, but remained on the track. The train gained upon him, and when it was within from 30 to 50 feet of him Daily applied the air brake and sounded the whistle attached to the brake. Stampfer did not then leave the track, but when the train was within 15 or 20 feet of him, started to run down the track in the direction of the lower depot. Shortly thereafter he was overtaken by the moving train, knocked down, run over, and killed.

It is clear that Stampfer was a trespasser upon the right of way of the defendant at the time he was run over and killed, as it appears the use of defendant's right of way as a means for foot passengers to reach defendant's lower depot from Citizens' Park was wholly unauthorized by the defendant; and, under the well-settled rules of law in force in this state, the defendant owed him no duty other than to abstain from wantonly and recklessly injuring him, and was bound only to use reasonable care to avoid injuring him after he was discovered to be in a perilous situation. *Illinois Central Railroad Co. v. Eicher*, 202 Ill. 556, 67 N. E. 376. The evidence shows that Daily warned Stampfer of the approach of the train so soon as he saw him upon the track, and

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did all in his power to stop the train as soon as he was apprised that Stampfer did not intend to leave the track. The train was running not to exceed six or eight miles an hour, and at any time, up to the time the accident occurred, Stampfer had but to step off the track to avoid being run over by the moving train. This he did not do, but attempted to avoid being injured by increasing his rate of speed. Up to the time Daily applied the air brake there was nothing in the conduct of Stampfer to indicate to him that Stampfer would seek so unusual a method as he did to avoid the danger which threatened him. Daily was not required to stop the train so soon as he saw Stampfer upon the track, but had the right to assume at that time he would act as a reasonably prudent man and leave the track to avoid being run over by the moving train, and so soon as Daily discovered Stampfer did not intend to leave the track and was in a perilous situation he was only required to use reasonable care to avoid injuring him. This he did by then using the means at his command to stop the train. The evidence failed to show a willful or wanton injury, or that the defendant did not use reasonable care to avoid injuring the deceased after he was seen to be in a position of danger. The court did not err in taking the case from the jury. While it is true that the questions of willfulness, recklessness, negligence, and kindred questions are usually questions of fact for the jury, yet when the facts are admitted, and the admitted facts, together with all legitimate inferences which may be drawn therefrom in favor of the plaintiff, do not tend to establish his right to recover, the court may rightfully direct a verdict in favor of the defendant. *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086.

The cases of *Chicago Terminal Transfer Railroad Co. v. Kotoski*, 199 Ill. 383, 65 N. E. 350, and *Chicago Terminal Transfer Railroad Co. v. Gruss*, 200 Ill. 195, 65 N. E. 693, relied upon by the plaintiff, are not like the case at bar. Here it was only necessary for Stampfer to step from the track to avoid injury from the approaching train, while in those cases it was necessary for the persons who were injured to make their escape from the approaching train by passing some distance over a high trestle on which the train was backing towards them, and, although their perilous situation was fully appreciated by the servants of the defendant in charge of the train, no effort was made by them to stop the train.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ALABAMA GREAT SOUTHERN R. CO. v. GUEST.

(Supreme Court of Alabama, Dec. 21, 1905.)

[39 So. Rep. 654.]

Railroads—Persons on Track—Injuries—Action—Instructions—In an action against a railroad company for the death of a pedestrian, the

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court instructed that, if those in charge of the train knew that the public were wont to pass with such frequency and in such numbers as that those in charge of the train knew that there was a likelihood that there were persons on the track and that such persons might be injured, the facts hypothesized showed such reckless indifference as would render defendant liable for the injuries, and plaintiff was entitled to a verdict if deceased was so killed, "notwithstanding there was no fault on the part of the servants of defendant," and notwithstanding that deceased was negligent. Held that, while the instruction might have had a misleading tendency, it was not reversible error, as the quoted phrase evidently referred to the conduct of the servants after the discovery of the peril of deceased.

Same.—Where, in an action for the death of one run over by a railroad train, a count of the complaint did not allege a high rate of speed at the time deceased was struck, except possibly inferentially and the evidence was conflicting as to the rate of speed of the train at the time it struck deceased, some witnesses putting it as low as two or three miles an hour, it was proper to refuse a requested instruction that the jury could not find for plaintiff on such count unless they were satisfied that the cars were being run at a high and dangerous rate of speed when deceased was struck.

Trial—Argumentative Instruction.—The court was requested to charge that the mere intentional omission to perform a duty, or the intentional doing of an act contrary to duty, although such conduct be culpable and result in injury, falls short of showing that the injury was wantonly inflicted, and that unless there was a purpose to inflict the injury it cannot be said to be intentionally done, and unless an act is done or omitted under circumstances known to the person such that his conduct is likely to result in injury, and through reckless indifference to consequences he consciously or intentionally does a wrongful act or omits an act, the injury cannot be said to be wantonly inflicted. Held, that the instruction was properly refused as argumentative.

Same—Formal Defects.—A requested instruction, that if the jury "believe from the evidence in this case they must find for the defendant," was properly refused as faulty in form.

Railroads—Persons on Track—Injuries—Action—Instruction.*—In an action for the death of one run over by cars detached from a locomotive, the court was requested to instruct that if the place at which the killing occurred was not in a populous district of an incorporated town, and was not a place where those in charge of the train knew the public were accustomed to pass with such frequency and in such numbers that they might know there was a likelihood that there were persons on the track, the jury could not find a verdict for plaintiff, unless after discovering the peril some agent or servant of defendant consciously failed to do something which he knew it was his duty to do to prevent the happening of the injury; and an instruction was also requested that, if the place at which deceased was killed was not a place where those in charge of the train knew the public were accustomed to pass with such frequency as that they might know or have reason to believe there was a likelihood that there were persons on the track, the jury could not find for defendant unless they found that after the discovery of the peril the agents failed to do their duty. Held, that the instructions were erroneously refused, since they correctly stated the law on the facts hypothesized.

Negligence—Wanton Negligence—Definition.†—An instruction that,

*For the authorities in this series on the subject of the care due trespassers and licensees on railroad tracks, see foot-note appended to preceding case.

†See extensive note, 17 R. R. R. 256, 40 Am. & Eng. R. Cas., N. S., 256.

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to constitute wanton negligence, an act done or omitted must have been done or omitted with a present knowledge that injury would probably result, is correct.

Evidence—Rebuttal.—Where, in an action for the death of one, run over by a railroad train, defendant, by the introduction of certain evidence, tendered an issue of suicide, it was competent for plaintiff to offer evidence in rebuttal.

Railroads—Injury to Person on Track—Action—Evidence.—In an action for the death of one run over by a railroad train, it was competent to show the condition as to the frequency and number of persons passing along defendant's track at the time and place in question.

Appeal from Circuit Court, De Kalb County; J. A. Bilbro, Judge.

Action by J. H. E. Guest, as administrator of the estate of J. M. Dean, deceased, against the Alabama Great Southern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought by appellee, J. H. E. Guest, as the administrator of the estate of J. M. Dean.

The following charges were given at the request of plaintiff:

“(41) To run a train at a high rate of speed and without signals of approach, without warning, at a place in a populous district of an incorporated town where those in charge of the train know the public are wont to pass with such frequency and in such numbers as that they may know there is a likelihood that there are persons on the track at such place, and that such persons may probably be injured by such trains, is such reckless indifference to the safety of such persons as would render the employer liable for injury resulting therefrom, notwithstanding there was negligence on the part of the person injured and no fault on the part of the servants after seeing the danger.

“(42) If the jury believe, from the evidence in this case, that the defendant's agent or servant in charge of the two cars and the caboose ran them at a high rate of speed, without signals of approach, without warning, at the place where the decedent, William Dean, was killed, and if said place of killing was in an incorporated town, where those in charge of said cars and caboose knew the public at said time were wont to pass and did pass with such frequency and in such numbers as that those in charge of said cars and caboose knew that there was a likelihood that there were persons on the track at the time and place when and where deceased, William Dean, was killed, and that such persons might be injured by such cars and caboose at that time and place, then that is such reckless indifference to the safety of such persons as would render the defendant liable for the injuries received; and in such event, plaintiff is entitled to a verdict, if Dean was thus killed, notwithstanding there was no fault on the part of servants of defendant, and notwithstanding the deceased, William Dean, was negligent.”

Charges were requested by and refused to defendant as follows:

“(18) The court charges the jury that the mere intentional

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omission to perform a duty, or the intentional doing of an act contrary to duty, although such conduct be culpable and result in injury, without more, falls very far short of showing that the injury was wantonly or intentionally inflicted. Unless there was a purpose to inflict the injury, it cannot be said to be intentionally done; and unless an act is done or omitted to be done under circumstances and conditions known to the person that his conduct is likely to or probably will result in injury, and through reckless indifference to consequences he consciously or intentionally does a wrongful act or omits an act, the injury cannot be said to be wantonly inflicted.

“(19) The court charges the jury that one who is injured in consequence of being negligently on a railroad track cannot recover, unless the railroad employees are guilty of such gross negligence or recklessness as amounts to wantonness or intention to inflict the injury; and that this wantonness and intention to do wrong can never be imputed to them, unless they actually know, not merely ought to know, the perilous position of the person on the track, and with such knowledge failed to resort to every reasonable effort to avert disastrous consequence. And this rule applies as well to densely populated neighborhoods in the country as to the streets of a town and city.”

“(23) The court charges the jury that if the place at which the killing occurred was not in a populous district of an incorporated town, and was not a place where those in charge of the train knew the public were accustomed to pass with such frequency and in such number as that they may know there is a likelihood that there are persons on the track at such time and place, then the jury cannot find a verdict for the plaintiff, unless they find that after discovery of peril some agent or servant of defendant consciously failed to do something which he knew it was his duty to do to prevent the happening of the injury.”

“(31) The court charges the jury that the plaintiff cannot recover in this case unless you are reasonably satisfied from the evidence that defendant's agent or servant in charge of the cars discovered deceased on the track, and knew from the surrounding circumstances that he would not or could not leave the track in time to prevent injuring him, and that with this knowledge, and having in mind what to do to prevent injuring him, he failed to use such means at command to avoid the accident.

“(32) The court charges the jury that, unless they are reasonably satisfied from the evidence that defendant's agent or servant in charge of the car could by the use of reasonable diligence have averted the injury to deceased after he was discovered on the track and after his perilous position and danger was known to them, they should find for the defendant.

“(33) The court charges the jury that, if they believe from the evidence that no skill and diligence and preventive efforts which the agent or servants could have put forth or used after they discovered Mr. William Dean on the track and his dangerous

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position could have averted the injury, then they must find for the defendant.

“(34) The court charges the jury that it is only when the employees of the company operating the car fail to exercise reasonable care to avoid injuring him after the party on the track had been discovered and peril of the injury had become apparent that they are held to be guilty of wanton negligence.

“(35) The court charges the jury that they cannot find for the plaintiff on the eighth count of the complaint unless they are reasonably satisfied from the evidence that the cars were being run at a high and dangerous rate of speed at the time William Dean was struck.”

“(37) The court charges the jury that if the place at which Mr. Dean was killed was not in a populous district of an incorporated town, and was not a place where those in charge of the train knew the public were accustomed to pass with such frequency and in such numbers as that they might know or have reason to believe there is a likelihood that there are persons on the track at such time and place, then the jury cannot find for the defendant, unless they find that after discovery of the peril of Mr. Dean defendant's agent or servant in charge of the cars failed to do something which he knew it was his duty to do to prevent injury.

“(38) To constitute wanton negligence, the act done or omitted must have been done or omitted with a present knowledge that injury would probably result.

“(39) If the jury believe from the evidence in this case, they must find for the defendant on the second count in the complaint.”

Goodhue & Blackwood, for appellant.

Howard & Isbell and *Davis & Haralson*, for appellee.

DOWDELL, J. On the former appeal in this case (*Alabama Great Southern Railroad Co. v. Guest*, Administrator, 136 Ala. 348, 34 South. 968) the principles of the law applicable to the case under the issues on which it was last tried were then very fully stated. There is no substantial difference in the facts now and then. The law as there stated in the opinion of Haralson, J., applies with equal force and pertinency here. The case was tried on the counts in the complaint counting on willful or intentional misconduct on the part of the defendant's servants or agents, or that which is in law the equivalent of willfulness, wantonness, or reckless indifference to probable results. What was said on the former appeal may well be repeated here: “It cannot be denied that plaintiff's intestate was a trespasser on defendant's track, to whom the company owed no duty except the exercise of reasonable care to avoid injuring him, if and after his peril became apparent to its employees; but they had no right to kill him on this account if they could avoid it. *Haley v. K. C. M. & B. B. R. Co.*, 113 Ala. 640, 21 South. 357. The doctrine thus stated and recognized, is not to be taken as of unqualified and unshaded application in all cases. A trespasser may not be yet discovered on

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the track of the company, but if the employee had reason to believe he was there it would be wantonness to take no care not to kill him. 'When a railroad runs its track through districts of a city, town, or village densely populated, and the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine over the track in such places to keep a lookout. This duty is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to guard against inflicting death or injury in places and under circumstances where and when it is likely to result unless due care is observed. The duty arises when the circumstances exist which call for its exercise.' *S. & W. R. R. Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *L. & N. R. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *L. & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; *M. & C. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231; *L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609. "To run a train at a high rate of speed and without signals of approach, where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers—facts known to those in charge of the train—as that they will be held to a knowledge of the probable consequences of maintaining greater speed without warning, so as to impute to them reckless indifference in respect thereto, would render the employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured and no fault on the part of the servants after seeing the danger. *Ga. Pac. R. R. Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Highland A. & B. R. R. Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153."

The doctrine that the duty of those in the management and control and running of locomotive engines and cars not to willfully or intentionally or wantonly kill or injure a trespasser is just as imperative as if the person so injured at the time of such injury was lawfully at the place is too well settled to admit of question. In other words, the duty owing to a trespasser not to willfully, intentionally, or wantonly injure him is as great as the duty owing to one who is not a trespasser. In such cases, the law makes no possible distinction. If the conditions, as to the numbers and frequency of persons upon the tracks of the railroad company and of which its agents or servants have knowledge, exist, so as to constitute it in law wantonness to run its trains at a dangerous rate of speed at such time and place, then it is wholly immaterial whether such conditions are created by trespassers or by such as may have a lawful right to be on the tracks. If the caboose and two cars were cut loose from the train and allowed to run down the track in the manner and way and under the circumstances and conditions as averred in the complaint, such act and conduct on the part of those in control

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of the train was as a matter of law wantonness, and subsequent efforts on the part of defendant's servants or agents, after discovering the peril of the deceased, to avoid injury to him, would not exempt the defendant from liability for the injury that was inflicted.

Charge No. 41, given at the instance of the plaintiff, states the law as above laid down, and the giving of it was, therefore, free from error. Likewise charge 42, given for the plaintiff, asserts the doctrine as above stated. It may be that this latter charge had a misleading tendency in the last clause, and for that reason might have properly been refused, yet the giving of it does not constitute reversible error. When the charge is taken as a whole, it is rendered evident that the statement in the last clause—"notwithstanding there was no fault on the part of the servants of defendant"—had reference to the conduct of the servants after the discovery of the peril of the deceased. It was certainly open to the defendant, if he conceived that there was any tendency to mislead the jury in this respect, to have counteracted any such tendency by requesting an explanatory charge.

The eighth count of the complaint does not aver that the detached cars and caboose were being run at a high and dangerous rate of speed at the time they struck the deceased except possibly in an inferential way. It is averred in the first part of this count that the two cars and caboose, which were detached from the train, were allowed to run down the main line of defendant's track, and in the conclusion of the count it is averred: "And on the day aforesaid, a few feet south of said public crossing at a point near said freight depot, defendant's agents and servants ran said detached cars and caboose willfully, wantonly, or intentionally upon or against said William Dean, and killing him." The evidence was in conflict as to the rate of speed of the cars at the time they struck the deceased. One witness put the rate as low as two or three miles an hour. It was, therefore, open to the jury, under all the evidence, to find that the cars and caboose, when detached, were allowed to run down the main line at a high and dangerous rate of speed, and when they struck and killed the deceased the speed at this particular time, by the subsequent efforts of the defendant's servant or servants after discovery of the deceased's peril, had been checked to the low rate of two or three miles an hour; and on this phase of the case, under the law as we have above laid down, written charge No. 35, requested by the defendant, was properly refused.

Charge 29, requested by the defendant, was substantially covered by written charges 13 and 15, given at the request of the defendant. Charge 18, requested by defendant, was argumentative, and there was no error in its refusal. Charges 19, 31, 32, 33, and 34, refused to the defendant, assert a contrary doctrine to that hereinabove laid down, and were therefore properly refused. Charges 20 and 30 were substantially covered by other written charges given at the instance of the defendant, and for this reason, if no other, there was no reversible error committed

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in their refusal. Charge 39 was faulty in form, and for this reason was properly refused.

Charges 23 and 37, requested by the defendant, were not abstract, as contended in argument by counsel for appellee, and on the facts hypothesized correctly stated the law. The trial court committed error in refusing to give each of said charges. It is insisted by counsel for appellee that charge 38, refused to the defendant, was substantially covered by written charges given at the instance of the defendant. We fail to find in the record any substantial duplicate for charge 38 in the written charges given for the defendant. This charge should have been given as requested. The definition of wantonness as contained in the charge is supported by *Brown's Case*, 121 Ala. 221, 25 South. 609, and *Bank's Case*, 132 Ala. 471, 31 South. 573.

By the introduction in evidence on the part of the defendant of the showing as to the witness Shafer, the defendant tendered an issue of suicide by the plaintiff's intestate, and in so doing made it competent for the plaintiff to offer evidence in rebuttal of this theory; and such was the character of the evidence objected to by the defendant. The general rule of the relevancy of evidence is that all facts are admissible in evidence which logically tend to prove or disprove the fact in issue. 11 Am. & Eng. Ency. Law (2d Ed.) 502. We find no error in the rulings of the court on the objections to evidence along this line. It was competent to show the condition as to the frequency and numbers of persons passing along the defendant's tracks at the time and place in question, and there was no error in the rulings of the trial court on the defendant's objection to evidence offered along this line.

For the errors pointed out, the judgment of the court below must be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

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(Supreme Court of Ohio, Oct. 31, 1905.)

[76 N. E. Rep. 91.]

Death—Wrongful Act—Right of Action.*—No action can be maintained in the courts of this state upon a cause of action for wrongful

*For the authorities in this series on the question whether there can be a recovery for wrongful death at common law, see foot-note appended to *Gregory v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 380, 34 Am. & Eng. R. Cas., N. S., 380.

For the authorities in this series on the subject of transitory actions and the extraterritorial effect of statutes creating a right of action, see foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31; *Kansas City So. Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71; *Raisor v. Chicago & A. R. Co.* (Ill.), 16 R. R. R. 96, 39 Am. & Eng. R. Cas., N. S., 96.

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death occurring in another state, except where the person wrongfully killed was a citizen of the state of Ohio.

(Syllabus by the Court.)

Error to Circuit Court, Mahoning County.

Action by Elizabeth M. Chambers against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Suit was brought by Elizabeth M. Chambers in the court of common pleas of Mahoning county, Ohio, against the Baltimore & Ohio Railroad Company, to recover damages from said company for negligently causing the death of her husband, Harry E. Chambers, who, she alleged, was killed on the 19th day of September, 1902, on the line of defendant's railroad in the state of Pennsylvania. Plaintiff in her petition pleads certain statutes of the state of Pennsylvania, and avers that under and by virtue of such statutes there accrued to her, because of the matters complained of in her petition, the right to maintain an action and recover damages in respect thereof against the defendant company in the state of Pennsylvania. She therefore claims the right to maintain such action in Ohio. At the trial of this cause in the court of common pleas of Mahoning county, at the May term, 1904, it was admitted by the plaintiff that at the time of the grievances complained of in her petition, and for a long time prior thereto, she and her said husband, Harry E. Chambers, were and had been citizens and residents of the state of Pennsylvania. On the trial of said cause the plaintiff, Elizabeth M. Chambers, to maintain the issues on her part, offered in evidence the deposition of J. J. Green. Thereupon, and before said deposition was read, the defendant objected to the introduction of any testimony in the case, assigning as reason therefor "that the averments of the petition do not constitute a cause of action against the defendant, and that, as the plaintiff and her husband were at the time of the occurrence of the grievances complained of citizens and residents of the state of Pennsylvania, and the negligence complained of and the injury inflicted occurred in the state of Pennsylvania, therefore no right of action accrued in this state." The court overruled the objection, and the testimony offered by the plaintiff was introduced, to which the defendant at the time excepted. Further testimony was offered and received over the objection of the defendant company, and after the arguments of counsel and charge of the court the case was submitted to the jury, who returned a verdict in favor of the plaintiff, Elizabeth M. Chambers. The defendant, the railroad company, within three days made and filed its motion for new trial, which motion was overruled by the court and judgment was entered on the verdict. Thereupon the railroad company prosecuted error to the circuit court of Mahoning county, which court affirmed the judgment of the court of common pleas. The company now brings error in this court.

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Arrel, McVey & Tayler, for plaintiff in error.

Murray & Koonce and *W. S. Anderson & Son*, for defendant in error.

CREW, J. The record in this case presents the question whether the widow of a decedent, who at the time of his death was neither a citizen of nor resident in the state of Ohio, can maintain an action in the courts of this state to recover damages for his wrongful death occurring in another state, where the statutes of the state in which he was killed gives her the right to maintain such action in that state. Or, differently stated, the question here to be determined is, will the courts of this state take and entertain jurisdiction of actions to recover damages for wrongful death under the statutes of a sister state, where, as in this case, the decedent and his next of kin were, at the time of the injury and death for which a recovery is sought, all citizens of, and residents in, such sister state. As appears of record in this case, the cause of action relied upon and pleaded by plaintiff in her second amended petition is not one arising in, or founded upon any statute of, the state of Ohio; but said cause of action is one that accrued to her in the state of Pennsylvania, and is founded upon certain statutes of that state set forth and pleaded by her in said amended petition as follows:

“That by reason of the premises a right of action accrued to plaintiff upon the death of her husband, the said Harry E. Chambers, in the manner aforesaid, by the means aforesaid, under and by virtue of the act of the General Assembly of the state of Pennsylvania approved April 15, 1851 (P. L. 669) and the act of the General Assembly of said state, approved April 26, 1855 (P. L. 309).

“Sections 18 and 19 (page 674), of the act of April 15, 1851, are as follows:

“‘Sec. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

“‘Sec. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.’

“Sections 1 and 2 of the act of April 26, 1855, are as follows:

“‘Sec. 1. The persons entitled to recover damages for any injury causing the death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors.

“‘Sec. 2. That the declaration shall state who are the parties

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entitled to such action; the action shall be brought within one year after the death and not thereafter.'

"Plaintiff further says that by section 21, art. 3, of the Constitution of the state of Pennsylvania, of 1874, it is provided as follows, to wit:

"'Sec. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from said injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted.'"

A comparison of the foregoing statutes with the wrongful death statutes of our own state, independent of section 6134a (Bates' Ann. St.), which is hereinafter specially considered, will disclose the fact that, although they belong to the same general class of legislation, they are nevertheless in many of their provisions wholly unlike the Ohio statutes. And, while in the present case we entertain the opinion that this dissimilarity in provision is not such as of itself to defeat jurisdiction, yet the fact that such dissimilarity exists is at least, we think, worthy of note. The following are some of the points of difference: Under the Pennsylvania statute the action for causing wrongful death must be brought by the widow, if there be one. Under the Ohio statute (section 6135, Rev. St. 1892) such action can only be brought by the personal representative of the deceased person. In Pennsylvania the action must be brought within one year from decedent's death, and there is no limit to the amount of the recovery. In Ohio (section 6135, Rev. St. 1892) the action must be brought within two years from the death of the decedent, and the amount that may be recovered is expressly limited to a sum not exceeding \$10,000. Plaintiff's action in the present case being in its nature special and one founded exclusively upon the statutes of the state of Pennsylvania, and being for a cause of action arising wholly within that state for wrongfully causing the death of a citizen of that state, even though such cause of action be held to be transitory in its nature, the only principle upon which plaintiff may invoke the jurisdiction of, or may maintain such action in, the courts of this state, in the absence of express legislative permission so to do, is that of comity, and, if her action be not sustainable upon that ground, she must be held to be without right to bring or maintain the same in the courts of Ohio, for it must be conceded that the statutes of Pennsylvania cannot operate to confer upon her any such right; they being without authority or binding force beyond the territorial limits of that state.

Judge Story, in his treatise on the Conflict of Laws, lays down, as the basis upon which all reasonings on the law of comity must necessarily rest, the following maxims: First, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory"; secondly, "that no state or nation can by its laws directly affect or bind property out of its own territory, or bind

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persons not resident therein, whether they are natural born subjects or others." The learned judge then adds: "From these two maxims or propositions there follows a third, and that is that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulation of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." Story on Conflict of Laws, § 23. And Minor, in his very recent work (Conflict of Laws, p. 10, § 6), in discussing the exceptions to the enforcement of a foreign law in the state of the forum, says: "Few general principles of private international law are so well settled as the rule that no foreign law (even though, under ordinary circumstances, it be the "proper law") will be enforced in a sovereign state, if to enforce it will be to contravene the express statute law or an established policy of the forum, or is injurious to its interests." The doctrine of the foregoing authorities—and many more might be cited to the same effect—leads to the conclusion that an action may only be brought and maintained in a jurisdiction other than that in which the cause of action arose, when the cause of action is itself transitory, and its enforcement not inconsistent with, or obnoxious to, the laws or public policy of the jurisdiction in which the suit is brought. In other words, the law of comity, so called, is not a law of absolute obligation, and its principles can never properly be invoked in aid of the enforcement of a foreign statute, where the effect of the enforcement of such foreign statute would be, or is, to set at naught the positive law or public policy of the particular forum to which resort is had.

Logically, then, the inquiry suggests itself in the present case, is it in harmony and accord with the laws and public policy of the state of Ohio to permit the enforcement in the courts of this state of a cause of action arising under the wrongful death statutes of the state of Pennsylvania in favor of the next of kin of one who at the time of his death was neither a citizen of nor resident in the state of Ohio. Primarily the Legislature must be held to be the judge of questions of public policy, and, if it has spoken plainly, either for or against the enforcement of a statute of a sister state in a given case, the courts must obey its mandate. It is well understood that at common law, in pursuance of the maxim "*Actio personalis moritur cum persona*," no right of action existed in favor of the heirs, distributees, or personal representative of a deceased person for damages for his wrongful death. The right of action which the injured person had abated with his death. This unsatisfactory state of the common law, with respect to the right to recover for death due to negligence or wrongful act, led to the passage of statutes giving a right of recovery in such cases. The earliest of these statutes was the English act of 1846 (St. 9 & 10 Vict. c. 93), commonly known as "Lord Campbell's Act," and this enactment has served as the model for much of the subsequent legislation on this subject, now to be found in most, if not in all, of the states of the Union.

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8 Am. & Eng. Ency. Law, 854, 858. By an act of the General Assembly of the state of Ohio, passed March 25, 1851 (Swan & C. Rev. St. p. 1139), Lord Campbell's act was adopted into, and became a part of the legislation of this state, and the right was thereby given for the first time in Ohio to recover for a death caused by wrongful act, neglect, or default. This statute, in the form in which it was originally enacted, was several times before this court for review, and it was uniformly held that the act gave no right of recovery in those cases where the wrongful act which caused the death occurred outside of the state of Ohio. This court so held in *Woodard v. Railroad Co.*, 10 Ohio St. 121; *Hover, Adm'r, v. Pennsylvania Co.*, 25 Ohio St. 667; *Brooks, Adm'r, v. Railway Co.*, 53 Ohio St. 655, 44 N. E. 1131, and *Railroad Co. v. Fox, Adm'r*, 64 Ohio St. 133, 59 N. E. 888; In *Hover, Adm'r, v. Pennsylvania Co.*, supra, the court says: "The act of March 25, 1851 (Swan & C. Rev. St. p. 1139), allowing an action by the representatives of a party whose death was caused by the wrongful act of another, does not extend to cases where the wrongful act which caused the death was committed outside the state of Ohio." In *Railroad Co. v. Fox, Adm'r*, supra, *Spear, J.*, at page 141 of 64 Ohio St., at page 889 of 59 N. E., referring to section 6134, Rev. St. 1892, which section differs in no essential particular from the original act of March 25, 1851, says: "It is established law in Ohio, however, that section 6134 does not extend to wrongful acts causing death outside of this state, and that prior to the passage of section 6134a, Bates' Ann. St., no action by an administrator for such cause could be maintained in our courts." This, then, was the status of the law of Ohio up to and until the enactment of original section 6134a, which was passed May 21, 1894 (91 Ohio Laws, p. 408), and is as follows: "Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state, in all cases where such other state, territory or foreign country allows the enforcements in its courts of the statute of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful neglect or default in this state, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country."

This legislation is supplementary in character, and presupposes and is in effect a legislative declaration that without it no action could be maintained in Ohio to recover damages for wrongful death occurring in another state, territory, or foreign country; for, if such right already existed under favor of the provisions of section 6134, Rev. St., then section 6134a, Bates' Ann. St.,

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was a vain and useless enactment. We think, therefore, it must be conceded that this statute created, and was intended to create and give, a new right of action which theretofore did not exist. But it will be observed that the right or authority thereby given to enforce such new right of action in this state for a death occurring in another state is a qualified and conditional right, and is, by express provision, subject to the limitation that the courts of the state in which the death occurred shall enforce the statute of this state of like character. In *Railroad Co. v. Fox, Adm'r*, supra, this court, as we have seen, recognized, and declared the fact to be, that section 6134a created and gave a new right of action, and, furthermore, the court in that case decided that the right of action so given could only be enforced in this state under the limitations and upon the condition prescribed in the statute. In the opinion in that case it is said at pages 144 and 145 of 64 Ohio St., at page 890 of 59 N. E.: "Nor is there ground for saying that our statute, section 6134a, is satisfied by the mere entertaining by the courts of another state of a cause of action for death occurring in our state. Such is not the language of the law. It is not the entertaining of the suit that is stipulated for, but enforcement of our statute of like character. This means that it is the law of Ohio which the sister state will enforce, not necessarily the law of that state, for where there is an essential difference, as has already been pointed out, it cannot be said by enforcing their own law the court of the other state is enforcing our statute. Our statute rests upon the ground of reciprocity which is based upon the idea of comity, and the very essence of reciprocity implies that each state, as to the subject-matter, shall have and enforce identical laws, not simply provisions which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that state to recover for death occurring in another state, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the state where the injury was committed." On May 6, 1902 (95 Ohio Laws, p. 401), section 6134a, above quoted, was amended, and the original section was repealed. This amended section, which was in force at the time of the trial of this case in the court of common pleas, provides as follows: "Whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country."

It is important to note that this amended section changes the former law in two essential particulars: (1) It dispenses with the condition that the state in which the wrongful death occurs shall

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enforce in its courts the statute of this state of like character. (2) It in terms limits the right therein given, to maintain an action in this state for wrongful death occurring in another state, to actions for causing the death of citizens of Ohio. Whereas original section 6134a gave such right without limitation or restriction as to citizenship. If, as contended by counsel for defendant in error in their brief herein, it was not the purpose or intent of the Legislature by this amendment to limit and restrict the right to recover in the courts of this state, for wrongful death occurring in another state, to those cases where the person killed was a citizen of Ohio, and if, as they contend, "the prime object of this statute [amended section 6134a] was to permit the actions embraced within its terms to be brought in the courts of the state of Ohio, whether or not our statute would be enforced in the foreign state and to give a statutory sanction to such actions, instead of allowing the same to remain subject to the law of comity," then indeed was the Legislature most unfortunate in the method employed and in the language used to accomplish this result. If such only had been the legislative purpose, that purpose could have been much more easily and effectively accomplished by merely omitting from original section 6134a the clause "in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character," and we think it but fair to presume that had such been the sole object sought to be accomplished by the Legislature that this amendment would have taken some such form. Having regard, then, to the scope and effect of the provisions of the section amended, and to the especial character of the amendments made, we think it clear that the Legislature by the adoption of amended section 6134a undertook, and intended thereby, to limit and restrict the right to recover in the courts of this state, for a wrongful death occurring in another state, to those cases where the person killed was, at the time of his death, a citizen of Ohio. But it is contended in argument by counsel for defendant in error that such construction and interpretation of this statute renders it unconstitutional, by putting it in conflict with section 2, art. 4, of the federal Constitution, which provides that: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." But the contrary is now too well established to be disputed. This constitutional provision applies to fundamental and universal rights, not to special privileges. Minor's Conflict of Laws, 15. Furthermore, under this statute, nonresident next of kin have equal rights, and our courts are equally open to them as to resident next of kin, provided, only, that the person whose wrongful death is the subject of the action was at the time of his death a citizen of Ohio. It is also suggested by counsel for defendant in error that if the courts of this state will not permit the enforcement therein of actions for wrongful death occurring in other states, without reference to the citizenship of the person killed, that in many cases the right

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of recovery will be wholly lost. This does not follow, for in all cases of diverse citizenship the federal courts are given jurisdiction, and the wrongdoer may be followed to any state into which he may go, and the right given by the state where the death occurred may there be enforced against him in the courts of the United States.

From a consideration of the statutes hereinbefore referred to and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this state that an action for wrongful death occurring in another state will not be enforced in the courts of this state, except where the person killed was, at the time of his death, a citizen of Ohio. And we think the case at bar aptly and forcibly illustrates the wisdom of such a policy. In the present case the plaintiff below, Elizabeth M. Chambers, resides in, and is a citizen of, the state of Pennsylvania. Her husband, Harry E. Chambers, at the time of his injury and death, resided in and was a citizen of the state of Pennsylvania. The alleged wrongful act occurred, and the cause of action arose, in the state of Pennsylvania. Defendant below, the Baltimore & Ohio Railroad Company, then operated, and now operates, its line of railroad in said state, and could have been as easily sued in that state as in Ohio. But for some reason, which we may guess, but which the record does not affirmatively disclose, plaintiff elected to bring her action in this jurisdiction as a matter of convenience, and not from necessity. To open our courts in such cases, and under these circumstances, for the adjustment and settlement of the rights of the parties, is to extend an invitation to all such persons, who may, for whatsoever reason, prefer to resort to our tribunals to seek the courts of this state to enforce their claims. Thus we should greatly add to the already overburdened condition of the dockets in all our courts, and thereby make the settlement of rights originating outside the state between citizens of other states a charge and burden upon the people of our own state. The Legislature of Ohio has, we think, by the foregoing legislation, manifestly declared that such is not the policy of this state.

It follows, therefore, that the judgment of the circuit court must be reversed and judgment entered for plaintiff in error upon the conceded facts.

Judgment reversed.

DAVIS, C. J., and SHAUCK, PRICE, and SPEAR, JJ., concur.

RYAN *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 2, Oct. 25, 1905.)

[89 S. W. Rep. 865.]

Electricity—Personal Injuries—Care as to Licensees.*—Where a contract between an electric company and another required the latter's servants to work in the electric company's power house, the company was bound to keep wires near which such servants were required to work so insulated and protected as to be safe.

Same—Proximate Cause—Probable Consequences.†—Where a servant of one who had contracted to do certain work in an electric power house was killed by a shock of electricity, caused by an iron pipe, which he was fitting, or by his wrench, coming in contact with an insufficiently insulated wire, the want of proper insulation was the proximate cause of the death.

Death—Contributory Negligence—Presumptions.‡—In an action for death, owing to the alleged negligence of defendant, in the absence

*For the authorities in this series on the subject of the care due licensees, on railroad premises, see foot-notes appended to *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476; foot-notes appended to *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Pennsylvania Co. v. Coyer* (Ind.), 15 R. R. R. 218, 38 Am. & Eng. R. Cas., N. S., 218.

†For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co.* (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; foot-notes appended to *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ramsbottom v. Atlantic Coast Line R. Co.* (N. Car.), 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; *St. Louis & S. F. R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Alabama Great Southern R. Co. v. Vail* (Ala.), 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; *Lewis v. Vicksburg, etc., Ry. Co.* (La.), 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; *Phillips v. Durham & C. R. Co.* (N. Car.), 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; *Anderson v. Southern Ry.* (S. Car.), 17 R. R. R. 701, 40 Am. & Eng. R. Cas., N. S., 701; foot-note appended to *Illinois Cent. R. Co. v. Watson* (Miss.), 17 R. R. R. 199, 40 Am. & Eng. R. Cas., N. S., 199; foot-notes appended to *Birmingham Ry., etc., Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; *Peerless Mfg. Co. v. New York, etc., R. R.* (N. H.), 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; *Shamblin v. New Orleans & N. W. R. Co.* (La.), 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528; *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa.), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; *Pharr v. Morgan's L. & T. R. & S. S. Co.* (La.), 16 R. R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Southern Ry. Co. v. Williams* (Ala.), 16 R. R. R. 429, 39 Am. & Eng. R. Cas., N. S., 429; *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

‡For the authorities in this series on the question whether there is a presumption of due care on the part of a person killed by a train or car, see foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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of evidence it is to be presumed that deceased was in the exercise of due care.

Electricity—Contributory Negligence—Evidence.§—Where the servant of one who had contracted to do certain work in the power house of an electric company was killed, by an iron pipe he was fitting, or by his wrench, coming in contact with an insufficiently insulated wire, it appearing that there was sufficient light at the place to enable him to do his work, but not sufficient for him to make an examination of the insulation, he had a right to assume that the insulation was sufficient, and was not guilty of contributory negligence.

Same—Action—Instructions.—The servant of one who had contracted to do work in an electric power house was killed, owing to an iron pipe that he was fitting, or his wrench, coming in contact with an insufficiently insulated wire; and in an action for the death the court charged that defendant was not required to use the most perfect form of insulation, and that if that which was used was reasonably safe there could be no recovery, but that if the insulation was in an imperfect and dangerous condition, which was known or could have been made known to defendant by reasonable care and inspection, and if deceased received an electric shock by reason of such imperfect condition, plaintiff was entitled to recover. Held, that the instruction was sufficiently favorable to defendant.

Same—Contributory Negligence.—The court instructed that, if the accident was the result of deceased's own negligence and carelessness in working in a place which a reasonable person in his position would know to be dangerous, or of his negligence as to the manner in which he performed his work, which negligence directly contributed to the injury, there could be no recovery; that a workman has no right to work in a place obviously dangerous, and that if he does so he takes the naturally incident risks; but that the mere fact that deceased might have known that the place was dangerous would not of itself deprive plaintiff of the right to recover, if in point of fact the accident resulted from defendant's negligence, and if deceased exercised such care and caution as a man of ordinary care and prudence in his calling would exercise under like circumstances. Held, that the instruction was a fair one on the doctrine of contributory negligence.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by Mary Ryan against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. W. Easley and Boyle, Priest & Lehman, for appellant.

John S. Leahy and Block, Sullivan & Erd, for respondent.

GANTT, J. This action was commenced July 19, 1901, against the St. Louis Transit Company and the Cullen & Stock Heating & Ventilating Company, to recover damages for the death of the plaintiff's husband. An amended petition was filed on the 10th of December, 1901, omitting all reference to the Cullen & Stock Company, other than the plaintiff's husband was a pipe fitter in the employ of the Cullen & Stock Heating & Ventilating Company, which was under contract with the appellant to erect and place in position in its power house on Tiffany avenue, between

§For the authorities in this series on the subject of the right of an employee to rely on his master's performance of duties owing to him, see foot-notes appended to *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 64, 36 Am. & Eng. R. Cas., N. S., 564.

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Vista and Park avenues, certain pipes for the conveyances of water through said building and to the engines and boilers therein. It is then alleged that on the 9th day of May, 1901, the plaintiff's husband, James P. Ryan, at the special instance and request, and with the knowledge and consent of the defendant transit company entered the said premises in order to perform the labor required of him in the construction and the erection of said pipes, that said Ryan was required to and did get upon a certain conduit, and while on said conduit, and while exercising the care and caution in and about his work which should have been exercised by a reasonably careful person, and while handling and adjusting one of said iron pipes entering into the construction in which he was then engaged, the said Ryan received through said pipe on which he was then working an electric shock, which then and there immediately caused his death. The petition further alleges that adjacent and in close proximity to said iron pipes then being erected by said James P. Ryan, were certain cables or wires used by appellant for the purpose of distributing and equalizing the electricity between the switching boards in said building, and as a part of its appliance in generating and distributing electricity for the purpose of propelling its street cars; that said cables or wires were highly charged with electricity and were known to be so highly charged by the appellant, and that the said wires or cables so charged were exceedingly dangerous to life and limb, and were known to be thus dangerous by the defendant; that because of the dangerous character of said wires or cables when so charged with electricity, and for the purpose of rendering them less dangerous, said wires had been insulated, but plaintiff charges the fact to be that the insulation on said wires or cables was decayed, insufficient, and inadequate to prevent the communication of electricity, with which said wires or cables were charged, to other metallic substance coming in contact therewith; that the same were negligently and carelessly insulated in an improper manner, and had been permitted to become decayed, disintegrated, and incapable of preventing the communication of electricity in said wires and cables to other metallic substances with which they might come in contact; that said wires or cables were negligently and carelessly strung along the ceiling of the basement of said building, and immediately over the conduit aforesaid; that said wires or cables were supported or held to the ceiling of said basement at spaces aggregating five feet, and by reason of the weight of said cables and the use to which they were put, the said wires sagged so that they hung from said ceiling at a point immediately over said conduit at a distance of about two feet below the ceiling, instead of being securely and tautly held close to the ceiling. The insulation of said wires was composed of a material that being stretched, would disintegrate, crumble, and fall off, thereby destroying the protection which said insulation was intended to afford, whereby the wires proper were suffered to come in contact with other substances, or, because of

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the defectiveness and insufficiency of the insulation, the electricity contained therein could be and was communicated to other objects with which said wires or cables could be and were in contact, and the said wires had been for a long time maintained by the defendant in the condition and position aforesaid; that is, in a condition and position such as permitted the electricity to be easily communicated to other substances coming in contact therewith, and that the maintenance of said wires or cables in said condition and position was negligence. Plaintiff says that on said 11th day of May, 1901, by reason of the defective condition of said wires and cables aforesaid, the electricity contained therein was communicated to the pipe or piping then being erected, and in the erection of which the said James P. Ryan was then engaged, and that while he, the said James P. Ryan, was erecting the said pipe or piping, and while he, the said James P. Ryan, was exercising due caution, the electricity communicated from said wires or cables to and through said pipe and piping was communicated to the body of the said James P. Ryan with such force and violence as to cause his immediate death as aforesaid. Plaintiff says that it was the duty of the defendant to provide the said James P. Ryan a safe place in which to perform his labor; that the said pipe or piping was erected by said James P. Ryan at the point indicated and immediately over the said conduit by the command and direction of the defendant; and that it was the duty of the defendant to keep the said location free of danger while he, the said James P. Ryan, was complying with the directions and commands of the defendant. But plaintiff says that the said place so furnished him to do the work aforesaid was not a safe place, but, on the contrary, and by reason of the facts aforesaid, the same was a highly dangerous place, and because of the danger of the electricity contained in said wires or cables and the probability of the same being communicated to the pipes and piping upon which he, the said James P. Ryan, was then working, because of the defective insulation resulting from the causes aforesaid, the defendant failed in its duty to keep and maintain the said location where the said James P. Ryan was then working free from danger, and that by reason of the failure of the defendant to furnish the deceased, James P. Ryan, a reasonably safe place in which to perform his labor, and its failure to keep the same free from danger, the said James P. Ryan was killed as aforesaid. The answer was a general denial, with a plea of the assumption of the risk by the deceased, and the deceased's contributory negligence in the handling of the tools and piping which he was engaged in installing. The reply was a general denial.

The facts developed on the trial were substantially as follows: Cullen & Stock Heating & Ventilating Company contracted with appellant, the St. Louis Transit Company to furnish materials and labor and install an automatic oiling system in appellant's power house at Tiffany and Vista avenues, in St. Louis, upon plans and specifications prescribed by appellant, the St. Louis

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Transit Company. For this purpose it was necessary to install in the basement room in the power house certain pipes suspended a short distance from the ceiling by hangers.

The plaintiff's husband was a steam fitter by trade, and was employed by the said heating and ventilating company to assist in this work, and was engaged for about three weeks in working on the premises in this connection. He and his helper, one Madden, installed the pipes referred to, and had put in three, and were engaged in putting in the fourth, when the accident occurred which cost him his life. The pipes ran parallel with each other, and a few inches apart. Above them were suspended a number of insulated wire cables, in use by appellant to transmit dynamic electricity to its overhead trolley wires in the streets, for the propulsion of its cars. These cables were constantly and highly charged with the electric fluid. They were suspended from the ceiling by hangers which were 11 feet and some inches apart, and which, according to the expert testimony in the case, were not close enough together; and between the hangers the cables had sagged downward. The experts said that the insulation of these cables was what was called weatherproof insulation, and not a proper kind of insulation to use in such a place as this basement, because this character of insulation was susceptible to heat, and the degree of heat which constantly prevailed in the basement was likely to cause this kind of insulation to soften, and possibly to drip or run. In its normal condition, the insulation used could not be cracked, penetrated, or broken so as to expose the live wires beneath it, without the exercise of considerable force, but if exposed to high temperature and softened, it might then be penetrated, broken or displaced, although subjected to no great degree of force. It might become softened by heat so as to be dangerous to handle, without that fact being apparent to the observation other than by actually touching the insulation. Plaintiff's husband was killed while putting in the pipe, in proximity to these cables, by the creation of what the experts call a short circuit, caused by contact between the wires of one of the cables and either the pipe upon which or the wrench with which he was working. This, the experts said, could not have happened if the insulation had been in good condition, because these cables were entirely harmless unless some metallic substance was brought in actual contact with the wires themselves, which could not have happened without the exercise of considerable force if the insulation had been in good condition. All of the testimony showed that with the insulation in normal condition, these cables could be handled with impunity. The only metallic substances, which Ryan was using or handling at the time were the pipes which he was installing, and the wrench which he and his helper were using to do the work. The evidence on the part of the plaintiff tends to show that one of these two came in contact with the wires beneath the insulation of the cable, and thus caused the short circuit which produced the flames and shock, and resulted in Ryan's death.

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It is conceded that the evidence does not disclose positively, which of the two made the contact. The parties were screwing the pipe into another by means of a wrench. Madden, the helper, who survived the accident, says his hand was between the wrench and the cable which was closest, and that, at the time of the catastrophe, they had ceased to pull on the wrench, and Ryan was looking at the coupling of the pipe, while he himself was simply holding the wrench in position, and exercising no more force than was necessary for that purpose. The experts were of the opinion that contact between the live wires and the wrench alone would not have produced the phenomena which happened, unless the wrench was at the time, in contact with the pipe, while contact between the pipe and the wire alone would have produced a short circuit. The wrench, the pipe, and the cable were before the jury, and the experts, from the condition of the two former, were of the opinion that the pipe and not the wrench, had made the contact. At the trial, the insulation upon a portion of the cable, then in a normal condition of temperature and hardness was hammered with a wrench without an effect. A portion of both the cable and the pipe were burned up in the contact at the time of the accident. It was further shown that the insulation on the cables at this place was soft and sticky at the time, although there was nothing to show that deceased knew that fact, or indeed, that he knew of the danger to which such a situation gave rise. The light in this basement was sufficient to enable the men to do the work they had set about, but not sufficient for one to make an examination of the insulation of these cables. Plaintiff's husband and Madden, his helper, attempted to light candles and a torch to furnish them more light to aid them in their work, but a strong draught prevented their doing it. The experts testified that owing to the excessive heat which constantly prevailed in this room, the proper kind of insulation to have used was either fireproof insulation, or fire and moistureproof insulation, each of which is impervious to the action of such heat as prevailed there. There was evidence also to the effect that the insulation might have been melted or softened by the excessive current of electricity passing through the cable as well as from the heat in the room. And that although the insulation had run and melted off, the outer covering of cloth would still remain, and that if the wire resting on the pipe had been perfectly insulated, the contact would not have occurred. The instructions given by the court will be noted and considered as far as necessary in the opinion of the court. The jury returned a verdict for the plaintiff for \$4,666.66. In due time the defendant filed its motion for a new trial and in arrest of judgment which were duly considered and overruled and the defendant brings the case to this court by appeal.

1. The first, and we may say the main, contention for a reversal of the judgment, is that the circuit court should have sustained a demurrer to the evidence, and this is based upon the ground that the defendant could not have reasonably anticipated

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the occurrence of such an accident as the one which caused the death of plaintiff's husband. It is practically conceded by the learned counsel for the defendant that the plaintiff's evidence justified the jury in finding that some portion of the insulation had run and dripped from the cable in consequence of the heat or temperature in the basement of the power house, and that the plaintiff's husband in some manner, not clearly explained by the evidence, allowed the wrench to rest upon the pipe or the other end of the wrench by his act, and that of his working companion to come in contact with the cable by breaking through the insulation thus softened by the temperature of the basement, and in this manner forming a circuit between the cable and the pipe. The tile conduit upon which he stood was a nonconductor. If one of his hands rested on the pipe and the other rested on the wrench both poles of the circuit would be present and the current would have passed through his body. The insistence is that the negligence of the softening of the insulation would not have caused the injury to the deceased, had he not caused the wrench to touch the wire, and no harm would have followed touching the wire with the wrench if the deceased had not had his hand on the pipe at the same instant he had it upon the wrench; and the doctrine is invoked that it is not negligence not to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, nor would not, unless under exceptional circumstances, have happened. In determining the soundness of the proposition thus advanced by the appellant, it is essential to ascertain what duty the defendant owed to plaintiff's husband with reference to its live wires in the circumstances of this case. It is to be noted that there were no contractual relations between the deceased, husband of the plaintiff, and the defendant transit company, but it is undisputed that the deceased was upon the premises of the company with its knowledge and consent, and to do a work for which the company had contracted with the employer of the deceased. When the defendant company made its contract with the Cullen & Stock Heating & Ventilating Company to install the oil system in the defendant's power house upon plans and specifications prescribed by itself, it knew and was bound to anticipate the necessity under which the Heating & Ventilating Company rested of sending its employees upon its premises for the purpose of installing the pipes upon which the deceased was working when he was killed; and hence the duty devolved upon the defendant of keeping the electrical wires near which the deceased was required to work in the performance of his duty in installing the oil pipes, so insulated and protected as to be safe for the deceased to work in their vicinity. This doctrine after a thorough consideration was announced in *Geismann v. Electric Company*, 173 Mo. 654, 73 S. W. 654. In that case the wire that caused the injury belonged to a lighting company, and was suspended at the place of the accident upon private premises, although the latter did not belong to the owners

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of the wires. The deceased in that case went upon the premises to remove a sign which apparently belonged to a tenant and in the course of his labors a wire with which the sign was suspended came in contact with a live wire which produced the shock which resulted in his death, and the conclusion was announced "that electricity is one of the most dangerous agencies ever discovered by human science, and, owing to that fact, it was the duty of the electric light company to use every protection which was accessible to insulate its wires at the points where people have a right to go, and to use the utmost care to keep them so, and for personal injuries to a person in a place where he has a right to be, without negligence on his part contributing directly thereto, it is liable in damages." The rule thus announced in the Geismann Case was followed and approved after a review of the authorities in *Young v. Waters Pierce Oil Company* (Mo. Sup.), 84 S. W. 929. The fact then that there was no direct contractual relation between the plaintiff's husband and the transit company will not prevent a recovery by the plaintiff, in view of the highly dangerous character of the electric wires about which plaintiff's husband was required to work. As was said by the Supreme Court of New Jersey in *Van Winkle v. American Steam Boiler Insurance Company*, 19 Atl. 472: "The law hedges around the lives and persons of men with much more care than it employs when guarding their property, so that in this particular it makes every one in a way 'his brother's keeper,' and therefore it may be well doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damages by the neglect of another in doing an act which if carelessly done threatens in a high degree one or more persons with death or great bodily harm."

In view of these legal principles, the insistence of counsel that the accident was one which the company could not have reasonably anticipated, and therefore was not bound for its failure to keep its electric cables properly insulated, would seem to be without merit. It was agreed on all hands that the insulation on these cables was safe enough when normal, but was shown to be of a kind to be easily affected by the extraordinary temperature to which the transit company knowingly and continually subjected them; and knowledge of the character of the insulation installed by itself, of the conditions under which it was maintained, and of the probable effect of those conditions on the safety of the insulation, must be chargeable to the defendant company. It knew, when it sent the plaintiff's husband to work about those cables, the kind of insulation it used, and, being in the exclusive control of the basement, the jury was justified in inferring that it had a knowledge of the condition of the insulation, and that it had in fact become soft and imperfect. While it is true that the evidence does not disclose exactly how the accident was occasioned, it does show that either the wrench or the pipe which the deceased was handling at the time of his death came in contact with the wires beneath the insulation of

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the cable. If the former, it was in its use in turning the pipe, and owing to the softened condition of the insulation; if the latter, it was because the cable sagged, and touched the pipe, and the pipe in turning displaced the soft insulation, and thus touched the live wire. That neither could have happened if the insulation had been in a good condition is obvious and was conclusively proven by the testimony in the case. The evidence without any contradiction showed that these wires were safe to approach and handle when the insulation was in a proper condition, and while it is dangerous to a greater or less degree to approach live wires under any conditions and the deceased was aware of this and even mentioned it to his companion, the evidence was clear that if the wires had been properly insulated and maintained in proper condition the danger was not imminent, and a reasonable man would have felt that he could safely undertake to work in their vicinity. This court in the Geismann Case cited and adopted the language of the Supreme Court of Louisiana in *Clements v. Electric Company*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348: "Electric wires are disarmed of danger if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily and without proper precaution for his safety. The wires, if properly insulated, would have been harmless." In this case the wires had been insulated. The light in the basement was not sufficient to enable the deceased to inspect the insulation and the draught was so strong that he and his co-workman could not keep a candle or torch burning. There was sufficient light for them to do the work they were sent to do. They had every reason in these circumstances to assume that the wires were safely insulated, and that they could work about them without danger to themselves; and it must be held that the company in contracting for the work of installing the oil pipes anticipated, or in the exercise of ordinary care were bound to anticipate, that these workmen, while in the course of their employment, would touch or come in contact with these cables, and therefore the principal contention of the defendant that it could not have reasonably anticipated the occurrence of such an accident as this appears to us entirely untenable, but that on the contrary the want of a proper insulation of these cables was the proximate cause of the injury to plaintiff's husband.

As to the other proposition advanced in support of the demurrer to the evidence, to wit, that plaintiff's husband was guilty of such contributory negligence as to bar a recovery, it is clear we think from the foregoing that deceased was not guilty of negligence in attempting to do his work under the conditions as they must have appeared to him as already detailed. There is no evidence whatever to support the claim that he was doing his

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work in a negligent manner; the presumption is that he was in the exercise of due care, and the question of his contributory negligence was duly submitted to the jury in the instructions given by the court.

2. It is urged that the court erred in its instructions in behalf of the plaintiff. These instructions were as follows: "The plaintiff in this case sues the transit company to recover damages for the death of her husband, James P. Ryan, which occurred on the 11th day of May, 1901, as the result of an electric shock received by him while working in the basement of Power House No. 2 of the defendant. The plaintiff claims that this electric shock was due to the fact that the insulation of the electric wires was improper, imperfect, and impaired, and that their condition was due to the negligence of the defendant. The defendant denies that there was any negligence on its part, and asserts further that the accident was the result of the negligence of Ryan himself, by reason of his failure to exercise due care in the performance of his work. You have heard all the testimony in the case, and the court instructs you as follows concerning the law: The deceased, Ryan, was lawfully on the premises of the defendant. Although Ryan was working for an independent contractor, and was not under the control of the defendant, still it was the duty of the defendant to exercise ordinary care and diligence to have the premises in reasonably safe condition. By ordinary care and diligence is meant such care as persons of ordinary prudence would exercise under the same or similar conditions. If the insulation on the electric wires in question was in an imperfect and dangerous condition, and if such condition was known to the defendant or could have been known by the exercise of reasonable care or inspection, and if Ryan received an electric shock by reason of such imperfect condition, and it was without any negligence on his part, then plaintiff is entitled to recover a verdict. The mere fact, however, that the insulation was in an imperfect condition would not make the defendant liable unless the further fact appears to your satisfaction from the evidence that the defendant knew or could have known of such defective condition by the exercise of due and ordinary care and inspection. On the other hand, you are instructed that defendant was not an insurer of the safety of plaintiff's husband, and would not be liable for the mere fact that Ryan was killed from an electric shock on defendant's premises, nor would the defendant be required to use the most perfect kind of insulation, if that which was used was reasonably safe and proper under all the circumstances and facts in the case, and the defendant would not be liable if the death of Ryan resulted from accident without the fault or negligence of anybody. Plaintiff cannot recover in this case unless the evidence shows and until she has satisfied you by the greater weight of the testimony that the death of her husband was due to the negligence of the defendant as defined and explained in these instructions in permitting the insulation to be imperfect. You are further instructed that with regard

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to the question of contributory negligence which defendant sets up in his answer, if the accident of Ryan was the result of his own negligence and carelessness in working in a place which a reasonable person in his position would know to be dangerous, or of his negligence and carelessness as to the manner in which he performed his work, and that his carelessness and negligence directly contributed to the injury, then plaintiff is not entitled to recover. A workman has no right to work in a place which is obviously dangerous, and if he does so, he takes the risks which are naturally incident to such a situation; but the mere fact that Ryan may have known that the place was dangerous would not in itself deprive the plaintiff of the right to recover, if in point of fact the accident resulted from the negligence of the defendant, and if Ryan while working in proximity to the cables exercised such care and caution as a man of ordinary care and prudence in his calling would exercise under like circumstances, and although he may have known there was danger, yet if the danger was not such as to threaten immediate injury to him, or if he might have reasonably supposed that he could safely work in proximity to said wires by the use of care and caution, then he cannot be said to have been guilty of contributory negligence."

The objection to these instructions seems to be that the instructions do not follow the allegations of the petition. We think the objections urged against these instructions are extremely hypercritical. Leaving out the preliminary statement of the court as to the respective claims of plaintiff and defendant, it is obvious that when the court came to charge the jury what facts would authorize the recovery by the plaintiff, it told the jury that the defendant was not required to use the most perfect form of insulation, and that if that which the defendant was using at the time was reasonably safe and proper, there could be no recovery, but if the insulation was in an imperfect and dangerous condition, and this condition was known to the defendant or could have been known by reasonable care and inspection, and if the deceased received an electric shock by reason of such imperfect condition without any negligence on his part, then the plaintiff was entitled to recover. The instruction was more favorable to the defendant than was authorized by the decision in the Geismann Case, but of this the defendant is in no condition to take advantage, as instruction was more favorable to it than it had a right to demand. The criticism on the instruction on contributory negligence we think is without any merit. The instruction taken as a whole and read all together was a fair and correct enunciation of the doctrine of contributory negligence as applied to the facts of this case.

3. Error is also assigned in the refusal of certain instructions prayed by the defendant. We have carefully gone through each one of these requests and noted the objections of defendant's counsel and without incumbering this opinion with a critical analysis of each of them, we must content ourselves with saying

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first to those which were applicable to the issues on trial, they were fully covered by those given by the plaintiff. The others had no relevancy to the case, and were properly refused on that ground, and could only have served to have misled the jury and turned their attention from the real facts of the case.

After full consideration of the record, we find no reversible error, and the judgment of the circuit court is affirmed.

BURGESS, P. J., and FOX, J., concur.

ILLINOIS CENT. R. CO. v. SCHULTZ.

(Supreme Court of Mississippi, Feb. 12, 1906.)

[39 So. Rep. 1005.]

Railroads—Injuries to Persons Near Track—Explosion of Torpedo.*
—A railroad company is liable for injuries to a pedestrian on a public highway running parallel with the railroad owing to the explosion by a train of a torpedo placed on the track contrary to the rules of the company.

Appeal—Review—Sufficiency of Evidence.—A verdict will not be disturbed on appeal, as not supported by the evidence, unless it clearly appears from the record that such is the case.

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

Action by Willie Schultz, by his next friend, Emma Schultz, against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Willie Schultz, a minor 13 years of age, brought suit by his mother and next friend, Emma Schultz, against the Illinois Central Railroad Company for injuries to his person. The trial resulted in a verdict and a judgment thereon in favor of the plaintiff, and the railroad company appeals. A train of the appellant company had been wrecked at the village of Oakland, and it became necessary to clear the main track of the wreckage and cars which had become derailed, in order to restore the track to proper condition for travel. The wrecking train had been ordered to this point and had been at work. To guard against collision with other trains, a flagman was sent out to warn south-bound approaching trains, and a torpedo was also placed on the track about 1,000 feet north of the point where the wreck was being cleared away. The torpedo was admittedly a dangerous explosive, and was for the purpose, when exploded by being run over by an approaching engine, of serving as a warning of danger. At the time of the accident the main track had been

*For the authorities in this series on the subject of the care required of a railroad company with respect to explosives in its possession, see foot-notes appended to *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502.

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placed in proper condition for travel, but the wreckage had not all been cleared away. Willie Schultz was going north from the station to his work, walking along the public road near the railroad track. A north-bound train, after passing the point from which the wreckage had been removed, exploded the torpedo, and by such explosion injured the appellee, who was walking near the track. It is not controverted that it is a violation of the rules of the railroad company to place a torpedo in close proximity to a building or public thoroughfare, and it is on this proposition that the appellee's suit is brought, alleging that the injuries received by him were due to the negligence of the employees of the railroad company in placing the explosive near the highway. The contention of the appellant is that the appellee was trespassing by walking, not on a public highway, but on or near the roadbed of the railroad company, and was injured without negligence on the part of its employees.

Mayes & Longstreet, for appellant.

Dinkins & Caldwell, for appellee.

TRULY, J. If the appellee's story be true, the torpedo, the explosion of which caused the injury, was placed near a public highway running parallel with the railroad, and he, while on such highway, lawfully enjoying the privileges of a pedestrian, was injured without negligence on his part. It is conclusively shown that it would be a violation of the rules of the railroad company, on account of the known danger of the explosive used, to place a torpedo in close proximity to a building or public thoroughfare. It is contended by the appellant that the torpedo was placed on the track at a point distant from any highway or building, and that the appellee, when injured, was a trespasser or licensee, walking within a few feet of its roadbed, and was injured without negligence on the part of the appellant or its employees.

If the story of the appellee be true, and the torpedo was wrongfully placed within the prescribed distance of a highway and negligently exploded, the legal liability of the railroad company is unquestionable. Counsel for the appellant do not seek to controvert this proposition. Their contention is that the appellant's statement of the case is sustained by the proof, and that the verdict for appellee was not justified by the evidence. If this be true, a different legal proposition might control. But in the condition of this record we are unable to say, with that degree of certainty requisite to authorize us to reverse a finding of fact by a jury, that the conclusion in the instant case is without the support of evidence. The record throughout contains repeated references to a diagram or map which was presumably used on the trial and by which the actors and places were located. But no such map is in the record, and the references to persons and to localities are so vaguely stated, and they otherwise appear so indefinite, that we are unable to substitute our own judgment upon the facts for that of the jury, and declare that the verdict is mani-

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festly wrong. Therefore, under the general rule, we must treat the finding of the jury as correct. For this reason, and without any reference to the propositions of law stated by counsel for appellant, we affirm the judgment.

Affirmed.

FITZMAURICE v. CONNECTICUT RY. & LIGHTING CO.

(Supreme Court of Errors of Connecticut, Dec. 15, 1905.)

[62 Atl. Rep. 620.]

Negligence—Condition—Use of Land—Care Required as to Children.*—In an action for negligence, it appeared that plaintiff, an infant about three years of age, while living with her parents, strayed upon defendant's land and climbed upon or fell into a pile of hot soot. Defendant's land had been used as a dumping ground for soot from a heating plant for several years, and was practically an open lot; the fences having been down ever since defendant bought it. There was nothing on the land likely to attract children, the place of the injury was not on or near a thoroughfare, and it had never been used as a playground or place of resort for children. Held, that defendant was not liable for failure to guard against such injury.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action by Vera Fitzmaurice, by her next friend, against the Connecticut Railway & Lighting Company, for injuries resulting from defendant's alleged negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

John J. Walsh and *John Keogh*, for appellant.

William T. Hincks, for appellee.

HALL, J. The plaintiff, an infant about three years of age, brings this action by her next friend. On the day alleged in the complaint, while living with her parents in a house belonging to her uncle, Patrick Fitzmaurice, she strayed upon the defendant's land, and either climbed upon or fell into a pile of hot soot, which one of the defendant's workmen had that day dumped in the defendant's yard, and was severely burned. Upon the following facts the trial court held that she was not entitled to a judgment for substantial damages: The back yard of the premises of said Patrick Fitzmaurice extended along the west side of land purchased by the defendant, about five years before the time of accident, as a place upon which to dump ashes and

*For the authorities in this series on the subject of the negligence of railroad companies in maintaining places and things attractive and dangerous to children, and in failing to warn them of the dangers, see foot-note appended to *Berg v. Minneapolis & St. L. R. Co.* (Minn.), 17 R. R. R. 616, 40 Am. & Eng. R. Cas., N. S., 616; foot-notes appended to *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

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soot from the furnace of its power house located upon land adjoining on the west, that of said Patrick Fitzmaurice. This land, in the rear of the defendant's premises, had been used by the defendant as such a dumping ground ever since its purchase in substantially the same manner as on the day of the accident. It was practically an open lot; the fences on the east and west sides of it having been down or in a dilapidated condition ever since the company bought it. It did not appear that there had been any division of the fence between the defendant's and Patrick Fitzmaurice's land for the purpose of repair. During most of the time while this yard had been so used, the accumulated ashes had formed a pile 15 to 20 feet wide, extending 30 or 40 feet from the rear of the power house, and sloping from a height of 3 or 4 feet down to the ground, at what remained of the divisional fence between the land of the defendant and that of said Patrick Fitzmaurice. While cinders and material from the dump sometimes slid down this slope upon the Fitzmaurice property, the ashes did not extend over upon it to any considerable extent at the time of the accident. The ash pile was distant from the street, and upon land not used by any one as a thoroughfare. Poor people of the neighborhood sometimes raked over the edges of the pile for coke, and were not driven away by the defendant. The place was not one likely to attract children, nor was there anything to cause the defendant to anticipate that a child of the plaintiff's age would stray unattended upon the premises and be injured. The plaintiff had never gone upon the defendant's lot before, nor had any one been burned by the ashes or soot upon said land. The soot by which the plaintiff was burned was dumped by the defendant's workman upon the side of defendant's lot most distant from the Fitzmaurice property during the forenoon of the day of the accident, which occurred at about 1:30 in the afternoon. There was nothing in the appearance of the pile of soot to indicate its heat. The defendant knew that the soot thus thrown out retained its heat for a considerable time, but did not throw water upon it or attempt to cool it in any other way. The trial court held that under these circumstances the defendant was not negligent, and that the injury to the plaintiff was due to her "infantile inexperience and helplessness."

Of the six reasons of the plaintiff's appeal the first, third, and fourth may be dismissed with the statement that the rulings assigned by them as erroneous do not appear to have been made by the trial court. The remaining reasons of appeal are, in substance, that the court erred in holding that there was no implied invitation to the plaintiff to come upon the defendant's premises, that the facts did not make the doctrine of "attractive nuisance" applicable, and that the defendant was not required to protect and safeguard the heated soot and ash pile upon its land. None of these assignments of error can be sustained upon the facts found by the trial court.

In support of his claims the plaintiff's counsel cites the case of *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261, and many

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cases of injuries to children whose presence upon the defendant's premises and near the dangerous object should have been reasonably anticipated by the defendant. In *Birge v. Gardner* the defendant was held liable upon the ground that he was negligent in placing a heavy gate upon or near the line of a lane or public passway over which the plaintiff, a child under seven years of age, and other children and persons, were accustomed to pass in going to and from the highway, to and from their homes, and because the gate, although upon the defendant's land, was left in such an insecure condition that it fell upon the plaintiff, when, as the defendant claimed to have proved, he put his hands upon it and shook it as he was passing along the lane from the highway to his home. The opinion states that the court did not decide whether the plaintiff was a trespasser or not, but that, if he was, the defendant might properly have been found guilty of such gross negligence as to render him responsible, as in cases of injuries to trespassers by spring guns and mantraps placed by the owners of land upon their property. Evidently the gross negligence of which he might have been found guilty was the careless leaving of this insecurely fastened and heavy gate, where he had reason to know it was liable to fall upon persons who might be lawfully using the public passway.

The case at bar differs from *Birge v. Gardner*, in that in the present case it appears that the plaintiff was a mere trespasser upon the defendant's land, that the object of danger was not on or near land used as a thoroughfare, and that the presence of an unattended child of the plaintiff's age near it was not reasonably to have been anticipated. It differs from most of the other cases cited of injuries to children either in the fact that the present defendant's land was never used as a playground or place of resort for children, or in the fact that the dangerous object was not in the present case calculated to attract or interest children. The owners of land are not required in using it for legitimate purposes to guard against every possible danger to children. To children whose presence upon the premises could not reasonably have been anticipated they owe no duty to keep their land free from dangerous conditions. As the facts show that the defendant had no reason to anticipate that a young and unattended child like the plaintiff might come into this dump yard and upon or near this pile of hot ashes or soot, it is not liable for the injury sustained by the plaintiff.

There is no error. The other Judges concurred.

PIERSON LUMBER CO. v. HART.

(Supreme Court of Alabama, Nov. 29, 1905.)

[39 So. Rep. 566.]

Master and Servant—Relation of Parties—Pleading.—A complaint alleging that plaintiff was employed as a foreman or boss is sufficiently specific as to the character of his employment.

Same—Cause of Injury.—In an action for injuries to an employee, received in jumping from a car to avoid imminent peril, an allegation that plaintiff was placed in a position of peril is sufficient, without giving the particulars causing the peril.

Same—Acts in Emergencies.*—Where an employee was injured in jumping from a car to avoid imminent peril, he need not show, in order to recover, that it was actually necessary for him to jump in order to save himself.

Same—Appliances—Negligence.—In an action for injuries to an employee, received in jumping from a car to avoid imminent peril, the court cannot assume that it was negligence not to have a particular kind of brake.

Same—Position of Peril.—In an action for injuries received by an employee in jumping from a car to avoid imminent peril, that the train was running only 10 miles an hour will not authorize the court to say that plaintiff was not in a position of peril.

Same—Unexpected Danger—Ordinary Care—Questions for Jury.*—An employee, exposed to sudden and unexpected danger, must exercise such reasonable care and diligence as would be expected of a prudent and reasonable man under similar circumstances, and whether or not, considering the circumstances, he did exercise such reasonable care, was for the jury.

Same—Contributory Negligence—Obvious Defects.—In an action for injuries to an employee, received in jumping from a car to avoid imminent peril, a plea not alleging that the danger from the supposed defect was either obvious or known to plaintiff was insufficient.

Appeal from Circuit Court, Covington County; H. E. Pearce, Judge.

"To be officially reported."

Action by W. H. Hart against the Pierson Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Powell, Albritton & Albritton, for appellant.

Stallings & Reid, for appellee.

SIMPSON, J. This was an action for damages, resulting from an injury received by the plaintiff, as he claims, while in the employment of the appellant and while jumping from a car to avoid imminent peril.

The first insistence of appellant is with regard to the first four assignments of error relating to the overruling of defendant's

*For the authorities in this series on the question whether failure to exercise good judgment, caused by fright, is contributory negligence; see foot-note appended to *Kansas City-Leavenworth R. Co. v. Langley* (Kan.), 15 R. R. R. 433, 38 Am. & Eng. R. Cas., N. S., 433; *Staines v. Central R. Co.* (N. J.), 17 R. R. R. 612, 40 Am. & Eng. R. Cas., N. S., 612; *Morey v. Lake Superior Terminal & Transfer Ry. Co.* (Wis.), 16 R. R. R. 113, 39 Am. & Eng. R. Cas., N. S., 113.

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demurrer to the complaint; it being insisted, first, that the character of plaintiff's employment is not definitely stated, inasmuch as it is stated in the complaint that he was employed as a foreman or boss; second, that it was not alleged that the plaintiff was in any danger of being thrown from the car or being seriously injured when he jumped from the same. The demurrers were properly overruled. The important relationship to show is that of employee, and the further designation of "foreman or boss" is sufficiently specific; the names each indicating the same general duties. The allegation that he was placed in a position of peril is sufficient, without entering into the particulars as to what caused the peril, and, being in a position of peril, it was not necessary to show that it was actually necessary for him to jump to save himself. *Postal Telegraph Co. v. Hulsey*, 132 Ala. 447, 31 South. 527.

The court erred in overruling the demurrer to the fifth count, as the court could not assume that it was negligence not to have a particular kind of brake.

The demurrer to the first plea was properly sustained. The fact that the train was running only at the rate of 10 miles an hour would not authorize the court to say that plaintiff was not in a position of peril.

The sixth and seventh pleas were properly held to be subject to demurrer. One exposed to sudden and unexpected danger is not responsible for acting without judgment or wildly, and whether he so acted depends materially upon the facts and circumstances of the case. The proper inquiry is, considering his surroundings at the time, did he exercise such reasonable care and diligence as would be expected of a prudent and reasonable man under similar circumstances? *Postal Tel. Co. v. Hulsey*, supra. It was for the jury to say whether or not, considering the circumstances, he did exercise such reasonable care and diligence.

The demurrer to the twelfth plea was properly sustained, as said plea did not allege that the danger from the supposed defect was either obvious or known to the plaintiff. *Boyd v. Indian Head Mills*, 131 Ala. 356, 31 South. 80; *Sou. Ry. Co. v. Guyton*, 122 Ala. 231, 241, 25 South. 34. The plea was otherwise insufficient.

There was sufficient evidence on the subject of plaintiff's employment, and the nature of it, to go to the jury. Consequently there was no error in the refusal to give the general charge, requested by the defendant.

Charges 3, 4, 5 and 11, requested by the defendant, were properly refused. *Sou. Ry. Co. v. Howell*, 135 Ala. 639, 648, 34 South. 6.

Charge 12 was properly refused. There was not any proof of negligence in the plaintiff, or of negligence or unskillfulness in the treatment by his physician. The only evidence is that he was very nervous, and that the doctor would find the bandages disarranged when he visited him. There was no evidence of any conscious fault of the plaintiff. *Postal Tel. Co. v. Hulsey*, supra.

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Charge 15 was properly refused. The plaintiff himself testifies that he was employed as foreman, and there is other testimony from which the jury might have found that he was so employed.

Charges 17 and 18 were properly refused. The complaint alleges that the plaintiff was foreman or boss of a crew of men engaged in hauling logs on a log train. Although his special duties may have been to attend to and supervise the loading and unloading of logs on said train, it is difficult to see how he could have performed these duties without going on the train from the place of loading to the place of unloading.

The judgment of the court is reversed, and the cause remanded.

HARALSON, TYSON, and ANDERSON, JJ., concur.

GREEN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1, Nov. 22, 1905.)

[90 S. W. Rep. 805.]

Railroads—Injury to Pedestrians at Crossing—Negligence—Liability.*—A railway company is not liable for the death of a pedestrian, occasioned by being struck by an engine, though it was negligent in running its engine at an unlawful rate of speed and in failing to ring the bell as required by the statute, where the negligence of the pedestrian directly contributed to the accident.

Same—Evidence—Sufficiency.—In an action against a railway company for the death of a pedestrian in consequence of being struck by an engine, the evidence showed that decedent was walking fast, looking straight ahead, and that she made but one step on the track when the engine struck her. The engine was run at from 15 to 40 miles per hour. Held insufficient to warrant a finding that she saw the engine until in a moment of peril, and hence there was no presumption that she trusted that the engineer was obeying the ordinance limiting the speed of trains to six miles an hour.

Same—Prima Facie Case of Negligence—Statutes.—Acts 1881, p. 79,

*For the authorities in this series on the subject of the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488; foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579; foot-note appended to *Dunworth v. Grand Trunk Western Ry. Co.* (C. C. A.), 14 R. R. R. 196, 37 Am. & Eng. R. Cas., N. S., 196.

For the authorities in this series on the subject of the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488.

For the authorities in this series on the subject of the combined effect of contributory negligence and negligence with respect to speed of train at crossing, see foot-notes appended to *Thomas v. Central of Georgia Ry. Co.* (Ga.), 18 R. R. R. 191, 41 Am. & Eng. R. Cas., N. S., 191; *Wolf v. City & Suburban Ry. Co.* (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210.

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amending Rev. St. 1879, § 806, making a railway company liable for damages which a person may sustain at a railway crossing in case the engine bell was not rung as required, by adding the proviso that the company shall not be precluded from showing that the failure to ring the bell was not the cause of the injury complained of, makes proof of the accident and of the failure to ring the bell as required sufficient for a prima facie case, and to throw on the company the burden of proving that the accident was not the result of the failure to give the signal; but where plaintiff, in proving the accident, also shows that it was not caused by the failure to give the signal, or that the person injured was guilty of negligence, there is nothing for the company to prove in order to prevail.

Appeal from Circuit Court, Franklin County; Jno. W. McIlhinney, Judge.

Action by John Green against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

M. L. Clardy and *Wm. S. Shirk*, for appellant.

James Booth, *William McNamee*, and *A. R. Taylor*, for respondent.

VALLIANT, J. Plaintiff's wife was killed by being run over by a locomotive on defendant's road in the city of Pacific. This suit was brought to recover \$5,000 damages, under the provisions of section 2866, Rev. St. 1899. The trial resulted in a verdict and judgment for plaintiff for that amount, and defendant has appealed.

The petition charges that the locomotive was negligently run at a high and excessive rate of speed; that the bell was not rung or kept ringing, as the statute requires; and the locomotive was run in excess of six miles an hour in violation of an ordinance of the city. The answer was a general denial and a plea of contributory negligence. Reply, general denial.

The testimony for plaintiff tended to show as follows: An ordinance of the city, prohibiting the running of locomotives or trains through or within the city limits at a rate of speed in excess of six miles an hour. Defendant's railroad tracks run east and west through the city. There is a main track, one side track north of the main track, and two or more side tracks south of it. We are concerned only with the main track and the side track north of it. Between these two tracks was a space eight feet wide. First street runs north and south, crossing the tracks at right angles. There is a sidewalk on each side of the street. A freight train had just come in from the west, headed east, and stopped on this north side track with the point of the engine at, or perhaps a little over, the west line of the west sidewalk. It stood there puffing or making the noise usual from engines just brought to a stop with steam on. The plaintiff's wife, with a party of friends, approached from the north on First street, walking south toward the railroad tracks, aiming to cross to the south side of the tracks. Something detained the plaintiff's wife a

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moment on the north side, while the rest of the party walked on across the tracks to the south side. The plaintiff's wife resumed her course, walking along the west side of First street until she came near the front of the engine of the freight train. Then she passed over to the east sidewalk, then on the south, crossing the side track on which the freight train was standing, crossing the eight-foot space between the tracks, and stepped with one foot on the main track, and in that instant a locomotive, coming east on the main track, struck her and killed her. Her body fell on the north side of the track. The engine which struck the plaintiff's wife was what they call a "helper"; its use being to help trains over a grade just west of Pacific. It had at this time no cars attached to it, and was being run backwards; that is, tender in front. It came without ringing the bell, and at a rate of speed of which the plaintiff's several witnesses gave various estimates, ranging from 15 to 40 miles an hour. Looking west from the crossing at First street, the main track was straight for 300 yards, and there was nothing in the way to obstruct the west view of one standing in the eight-foot space between the tracks. So far as the witnesses could discern, the deceased, after passing the front of the freight train, continued onward until she stepped upon the main track, without pausing and without turning her head to look in either direction, keeping her face straight to the south. Some of the plaintiff's witnesses said she was running; others that she was walking fast. All said she was looking straight south, and going fast. At the close of the plaintiff's case defendant asked an instruction in the nature of a demurrer to the evidence, which was refused and exception taken. The defendant's evidence was to the effect that the engine was running only six or seven miles an hour, and that the bell was ringing all the while. In other respects it was not materially different from that of plaintiff. At the close of all the evidence the defendant again asked an instruction in the nature of a demurrer to the evidence, which was also refused and exception taken.

The demurrer to the evidence should have been sustained. Conceding that the engine was going at an unlawful rate of speed, and that the bell was not ringing, and therefore that defendant was negligent, still the defendant was not liable, if there was negligence of the deceased which directly contributed to the accident. The testimony shows that the situation was such that if the deceased, after passing the freight engine and before stepping on the main track, had looked, she would have seen the helper engine coming, and could have paused in a place of safety until it passed, but that she did not look, and went on to her death. Counsel for respondent think that one of the witnesses testified that she did stop and look, but that is a mistake. The witness said that she stopped 10, 12, or 15 feet from the crossing, alluding probably to a stop before passing in front of the freight engine. Twelve or 15 feet would have placed her north of the freight engine, and 10 feet would have located her in front of it.

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Her view of the main track to the west came only after she had passed into the eight-foot space between the tracks. It is argued, also, by plaintiff's counsel that, without pausing and without turning her face to the west, she could, by simply turning her eyes, have seen the engine coming for a distance of 200 or 300 feet, and that, recognizing, as we should, the natural law of self-preservation, she should be presumed to have done so. Taking that assumed fact for a foundation, the learned counsel for plaintiff build upon it the argument that, seeing the engine at least 200 or 300 feet away, she trusted that the men in charge of it were obeying the ordinance and running not faster than six miles an hour, and therefore calculated that she could cross the main track before the engine reached her. In making that argument the counsel must be presumed to have abandoned the plaintiff's position, in so far as it rested on negligence in failing to ring the bell, because the only purpose of the law in requiring the bell to be rung is to attract attention, but if she saw the engine coming, as plaintiff's counsel contend she did, she needed no bell to attract her attention. The theory on which this argument rests for a foundation is itself founded on a debatable proposition. The distance one may see by a side glance without turning his face varies according to the angle at which the glance is given. Whether one standing within two, four, or six feet of the main track could by such a glance have seen this engine 200 feet away is a question that men might differ about. But that one could have seen it twice that distance by turning his head is certain. The evidence was that deceased had made but one step on the track when the engine struck her. Miss Alice Dailey, who was the principal witness for the plaintiff, and a very intelligent one, said that the deceased had only one foot across the rail when she was struck. The witnesses all said that she was going fast and looking straight ahead. Under this evidence, therefore, it is mere conjecture to say that she gave a side glance to the right and saw the engine 200 feet away, or that she saw it at all.

The plaintiff's testimony as to the speed the engine was going was all that of nonexpert witnesses, and their inaccuracy is shown by the variety of their estimates, from 15 to 40 miles an hour. Whatever was apparent to them as to the speed of the engine was as apparent to the deceased, if, as is contended, she looked and saw it. Her friend, Miss Dailey, and her brother-in-law Mr. Busch, who were of her party, and who had passed safely over the crossing before her, turned around in anxiety for her safety, and were looking towards her. Mr. Busch ran towards her. They saw and realized her danger, and what they saw and realized she would have seen and realized, if she had looked before stepping on the track. They probably saw the oncoming engine before she could have seen it, because they had reached the south side of the track, while her view was obstructed by the freight train, but after she had passed the front of the freight engine, and had come into the eight-foot space between the two tracks, she had as clear a view as her friends had, and was as capable

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of judging the speed of the engine as they were; but she failed to look.

The facts in this case are very different from those in *Hutchinson v. Ry.*, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710, to which we are referred. In that case it was after dark in the evening. The deceased heard the whistle and saw the headlight of the engine about half a mile distant when she started across the tracks. If the engine had been running within the six-mile speed limit, she would have had ample time to cross, even pausing, as she did, to pick up a scarf she had dropped. The court held that, in the absence of proof that she knew or had reason to apprehend to the contrary, she had a right to presume that the engineer was observing the ordinance, and to regulate her movements accordingly. But the accident we are now discussing did not occur at night. It occurred at 9 o'clock in the morning, and the plaintiff's witnesses say that they saw that the engine was running at a high rate of speed. There was not one of them shown to be more competent to judge of the speed than the deceased. The only difference in that respect between them and her was that they looked and she did not. If one sees or has reason to believe that the engine is running in violation of the speed ordinance, he has no right to risk his life on a presumption that the ordinance is being observed. There is in this case no ground on which to construct a rational presumption that the deceased trusted that the engineer was obeying the ordinance. There is no evidence on which we can base a finding that she saw the engine at all until in the moment of peril. It was imminently dangerously close when she stepped on the track. All the eye-witnesses say she was coming fast. She put her foot over the rail, and in that instant the engine struck her. She was probably in a hurry to overtake her friends, who had gone on ahead, and she was possibly in a state of nervous excitement at having to pass so close to the front of the throbbing freight engine, but however that may be, and whatsoever the cause, she forgot to look at the danger into which she was running.

Plaintiff's case rests on two propositions: First, that the deceased saw the engine coming, and trusted that it was running within the limits of the speed ordinance; second, that she did not see it coming, and trusted that none was coming because she heard no bell. The plaintiff may choose which of these two positions he will take, but he cannot take both, because they are inconsistent. The proof of one disproves the other. If the deceased saw the engine coming she did not suffer from failure to ring the bell. If she did not see it, there was no occasion for her to take the speed ordinance into account in regulating her movements. The plaintiff's position in regard to the failure to give the statutory signal is that when he proves that the bell was not rung, and that the accident occurred, he makes out a *prima facie* case, and the burden is shifted on the defendant to show that the failure to give the signal was not the cause of the accident. The statute requiring the signal by bell or whistle was

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the same prior to 1881 that it is now, except in its last clause, which then was in these words: "And said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." Section 806, Rev. St. 1879. But in 1881 the section was amended by striking out these words and inserting in lieu of them these words: "And said corporation shall also be liable for all damages hereafter sustained at such crossing when such bell shall not be rung or such whistle sounded as required by this section: Provided however nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury." Acts 1881, p. 79. And in that form the statute appears in our present revision. Section 1102, Rev. St. 1899. The purpose of that amendment was, as is rightly contended by the plaintiff's counsel, to make the proof of the accident and the proof of failure to give the required signal sufficient for a prima facie case, and to throw the burden of proving that the accident was not the result of the failure to give the signal on the defendant. It was so decided in *Huckshold v. Ry.*, 90 Mo. 548, 2 S. W. 794. Therefore, if the only evidence in this case was proof of the accident and proof that the bell was not rung, there would have been, according to the terms of the statute, a prima facie case, leaving the burden of proving facts to show nonliability on the defendant. But where the plaintiff, in proving the accident, proves also that it was not caused by the failure to give the signal, or that the person injured was guilty of negligence that directly contributed to the result, there is left nothing for the defendant to prove. That is this case.

There are other points presented in the briefs, but, as what is above said disposes of the case, there is no use of further discussion.

The judgment is reversed. All concur.

ST. LOUIS SOUTHWESTERN RY. CO. v. COCHRAN.

(Supreme Court of Arkansas, Jan. 6, 1906.)

[91 S. W. Rep. 747.]

Railroads — Killing Child on Track — Contributory Negligence of Father.*—Where a father, suing a railroad company for the killing of his child of tender years, was guilty of contributory negligence in permitting the child to go on the track unattended, the company was not liable unless it discovered the peril in time to have avoided the injury by the use of ordinary care.

Appeal from Circuit Court, Lafayette County; Charles W. Smith, Judge.

*For the authorities in this series on the subject of the effect of contributory negligence of parents on the right to recover for injuries to their children, see foot-notes appended to *Richmond, F. & P. R. Co. v. Martin* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435.

St. Louis Southwestern Ry. Co. v. Cochran

Action by W. J. Cochran against the St. Louis Southwestern Railway Company for damages resulting from the death of his son, caused by alleged negligence of the defendant in the operation of its train. The plaintiff recovered judgment, and defendant appealed. Reversed.

Sam H. West and *Gaughan & Sifford*, for appellant.
Smead & Powell, for appellee.

McCULLOCH, J. Appellee, W. J. Cochran, sued appellant, the St. Louis Southwestern Railway Company for damages resulting to him as parent from the death of his child 22 months of age, alleged to have been negligently run over and killed by appellant in the operation of its train. Appellant answered denying the allegations of negligence, and alleged that the plaintiff was guilty of negligence in permitting the child to go upon the railroad track unattended. The court over the objections of the defendant, gave the following among other instructions upon request of the plaintiff, viz.: "(2) The jury are instructed that if they believe from the evidence that the plaintiff, the father of the child, was in fault, and that the child, while wrongfully on defendant's track, was killed by defendant's train, but that the defendant's agents were aware, or by use of ordinary diligence might have been aware, of the fact that the child was on the track, in time to avoid injuring him, by reasonable diligence, the failure to use such diligence alone must be considered the proximate cause of the injury." "(5) The jury are instructed that it was the duty of the defendant, through its engineer and fireman, to keep a constant lookout for persons on the track. It is not necessary under the circumstances in proof in this case that both the engineer and fireman, from their respective positions on the engine, should have kept such lookout, but to meet this requirement it is necessary that either the fireman or engineer keep such constant lookout for persons on its track. And if you believe from all the acts and circumstances detailed in evidence that such constant lookout was not kept by either the fireman or engineer at the time and place of the injury complained of, and that by reason of such neglect to keep said lookout, deceased, John Franklin Cochran, was killed as alleged in plaintiff's complaint, your verdict will be for the plaintiff."

The defendant asked instructions to the effect that if plaintiff was guilty of contributory negligence in permitting the child to go upon the track unattended, he could not recover unless the servants of defendant failed to exercise care to avoid the injury after they discovered the perilous position of the child; but the court modified them by adding language permitting the jury to find for the plaintiff, notwithstanding his contributory negligence, if by use of ordinary care the servants of the plaintiff could have discovered the perilous position of the child, in time to have avoided the injury. A child of tender years cannot be guilty of negligence, nor can the contributory negligence of the parent be imputed to it so as to prevent a recovery in a suit brought by the

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child to recover damages for injury caused by the negligent act of another. But the father may, in a suit brought for his own benefit for the negligent killing of his child, be chargeable with negligence contributing to the jury. *St. L., I. M. & Sou. Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46; *St. L., I. M. & Sou. Ry. Co. v. Colum*, 72 Ark. 1, 77 S. W. 596. The court instructed the jury that, notwithstanding the contributory negligence of the plaintiff, he could recover if defendant's servants in charge of the train were aware of the presence of the child upon the track, or, by the exercise of ordinary care, could have discovered its presence in time to have avoided the injury. This was erroneous.

It has been repeatedly held by this court that the Act of April 8, 1891, known as the "lookout statute" is not applicable in suits for injury to persons upon a railroad track where the person injured was guilty of contributory negligence. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *St. L. S. W. Ry. Co. v. Dingman*, 62 Ark. 245, 35 S. W. 219; *Martin v. L. R. & Ft. S. Ry. Co.*, 62 Ark. 156, 34 S. W. 545; *St. L., I. M. & Sou. Ry. Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *St. L., I. M. & Sou. Ry. Co. v. Taylor*, 64 Ark. 364, 42 S. W. 831; *St. L., I. M. & Sou. Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994. The statute is applicable to a suit by a child of such tender age as to lack sufficient discretion to be chargeable with negligence (*St. L., I. M. & Sou. Ry. Co. v. Denty*, 63 Ark. 177, 37 S. W. 719), but not in suits brought by parents for their own benefit on account of injury to children of tender years where their own negligence contributed to the injury (*St. L., I. M. & Sou. v. Leathers*, *supra*; *St. L., I. M. & Sou. Ry. Co. v. Dawson*, *supra*; *St. L., I. M. & Sou. Ry. Co. v. Colum*, *supra*). "The true rule, which no amount of amplification can simplify, is that whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable," unless the defendant discovered the peril in time to have avoided the injury by the use of ordinary care. *Johnson v. Stewart*, *supra*.

For the errors indicated the judgment is therefore reversed, and the cause remanded for a new trial.

STATE v. MISSOURI, K. & T. RY. CO. OF TEXAS *et al.*

(Supreme Court of Texas, Feb. 1906.)

[91 S. W. Rep. 214.]

Monopolies—Prohibited Combinations—Transportation.*—Rev. St. 1895, art. 4540, requires every railroad to furnish reasonable and equal facilities, upon reasonable and equal rates, to all corporations engaged

*For the authorities in this series relating to trusts, monopolies, and other unlawful combinations in restraint of trade, see *Yazoo & M. V. R. Co. v. Searles* (Miss.), 14 R. R. R. 465, 37 Am. & Eng. R. Cas., N. S., 465; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.* (Ill.),

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in the express business, and Acts 1903, p. 119, c. 94, defines a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state, or to prevent or lessen competition in the transportation of merchandise, and makes a trust unlawful. Held, that a contract between a railroad company and an express company, whereby the latter was given "exclusive privileges," and the former bound itself not to contract with others to do an express business on the road, and agreed that, in case privileges should be recorded others by legislation or judicial proceedings, the express company in question should have credit for the sums paid by other companies, was violative of the anti-trust statute.

Same—Statutes.—Acts 1903, p. 119, c. 94, making trusts unlawful, and imposing a penalty for each day the offense is continued, applies to the carrying on of a combination within the statute, though the combination was formed prior to the statute.

Constitutional Law—Obligation of Contract.—Acts 1903, p. 119, c. 94, making trusts unlawful, imposing a penalty for each day the offense is continued, and applying to the carrying on of a trust subsequent to the statute, though formed prior to the statute, is not unconstitutional, as impairing the obligation of contract.

14 R. R. R. 722, 37 Am. & Eng. R. Cas., N. S., 722 (condemnation of certain land of another railroad company for the purpose of laying an additional track, as a double-track railroad, did not violate Ill. Const. 1870, art. 11, § 11, forbidding a railroad from owning a parallel or competing line); *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 13 R. R. R. 56, 36 Am. & Eng. R. Cas., N. S., 56 (competing lines—agreement between that one of them, "will not reduce its present rates of fare, unless required by law," not against public policy); *Edson v. Southern Pac. R. Co.* (Cal.), 12 R. R. R. 771, 35 Am. & Eng. R. Cas., N. S., 771 (lowering passenger rates for purpose of competition—what constitutes under Cal. Const. art. 12, § 20); *Northern Securities Co. v. United States* (U. S.), 11 R. R. R. 56, 34 Am. & Eng. R. Cas., N. S., 56 (violation of Federal Anti-Trust Act, etc.); *State v. New Orleans Warehouse Co.* (La.), 7 R. R. R. 334, 30 Am. & Eng. R. Cas., N. S., 334 (monopoly charged against Morgan's Louisiana & Texas Railroad raises legislative, and not judicial question); *Dady v. Georgia & A. Ry.* (Ga.), 1 R. R. R. 594, 24 Am. & Eng. R. Cas., N. S., 594 (right of railroads to consolidate as affected by fact that they both cross shallow rivers on which are freight and passenger steamboats); note, 7 Am. & Eng. R. Cas., N. S., 346 (right to lease competing roads); note, 1 Am. & Eng. R. Cas., N. S., 381, 15 Am. & Eng. R. Cas., N. S., 841 (whether constitutional prohibition against consolidation of competing lines prevents leasing); note, 11 Am. & Eng. R. Cas., N. S., 796 (validity of contracts between railroads to prevent competition); *United States v. Trans-Missouri Freight Association* (U. S.), 7 Am. & Eng. R. Cas., N. S., 388 (application of Federal "Trust Act," etc.); *Louisville & N. R. Co. v. Kentucky* (U. S.), 3 Am. & Eng. R. Cas., N. S., 525 (validity of provision of Ky. Const. prohibiting the consolidation of competing lines, etc.); *Interstate Commerce Commission v. Alabama Midland R. Co.* (C. C. A.), 3 Am. & Eng. R. Cas., N. S., 638 (validity of Southern Railway and Steamship Ass'n, etc.); *Pearsall v. Great Northern R. Co.* (U. S.), 3 Am. & Eng. R. Cas., N. S., 503 (consolidation of competing roads, validity of agreement, etc.); *State v. Central of Georgia Ry. Co.* (Ga.), 16 Am. & Eng. R. Cas., N. S., 845 (validity of combination of competing lines, etc.); *State v. Montana Ry. Co.* (Mont.), 11 Am. & Eng. R. Cas., N. S., 353 (competing lines, what are under provision to prevent consolidation); *Van Steuben v. Central R. Co. of N. J.* (Pa.), 9 Am. & Eng. R. Cas., N. S., 485 (validity of lease of non-connecting roads under Pennsylvania laws).

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Monopolies—Statute—Construction.—Acts 1903, p. 119, c. 94, prohibiting trusts, and defining a trust as a combination of capital, skill, or acts of two or more persons to prevent or lessen competition in transportation, is not rendered inapplicable to a contract between an express company and a railroad company by the existence of prior laws creating the railroad commission, and investing it with power to regulate rates charged by railroads and express companies.

Same—Action for Penalty—Pleading—Sufficiency.—In an action by the state to recover penalties for a violation of the anti-trust act (Acts 1903, p. 119, c. 94), an allegation of the petition that, after the passage of the law, defendants "continued to treat such contract as a valid and binding contract, and executed and carried it out," was a sufficient allegation that the features of the contract constituting the unlawful combination were carried out after the statute went into effect, at least as against a general demurrer.

Same—Right to Sue.—The Attorney General may maintain an action to recover penalties for a violation of the anti-trust act (Acts 1903, p. 119, c. 94) on the part of a railroad and express company, without the consent or permission of the railroad commission.

Certified Question from Court of Civil Appeals of Third Supreme Judicial District.

Action by the state against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment dismissing the petition, the state appealed to the Court of Civil Appeals, which certifies questions to the Supreme Court.

R. V. Davidson, Atty. Gen., *Warren W. Moore*, Dist. Atty., *Lackey & Lewright*, and *Allen & Hart*, for the State.

Baker, Botts, Parker & Garwood, *Alexander & Thompson*, *T. S. Miller*, *Fiset & McClendon*, and *Clarence H. Miller*, for appellees.

WILLIAMS, J. This case is submitted upon the following certificate from the Court of Civil Appeals for the Third District:

"This is a case now pending in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, wherein the state of Texas in the district court of Travis county sought to recover from the appellees penalties for an alleged breach and violation of the anti-trust acts of 1899 and 1903. A general demurrer in the court below was sustained to the petition, and the case dismissed, from which judgment the state of Texas has appealed. The petition is as follows:

"'First. That the state of Texas is the plaintiff herein and is represented by Warren W. Moore, her district attorney in and for the Twenty-Sixth judicial district of Texas, and acting under the authority and by the direction of the Attorney General of the state of Texas. That said district attorney applied to the railroad commission of Texas for permission and direction to bring this suit, but such permission and direction were declined by said railroad commission of Texas, because they had no jurisdiction in the matter and had nothing to do with the case. The defendants are the Missouri, Kansas & Texas Railway Company of Texas, a railroad company incorporated under the laws of the state of Texas, and the American Express Company, a joint-stock com-

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pany organized under the laws of the state of New York, doing business in Texas and having about 1,500 stockholders or members of said stock company residing in various parts of the country, whose names and residences are unknown to the plaintiff.

“‘Second. That on the days and dates hereinafter mentioned, the defendant Missouri, Kansas & Texas Railway Company of Texas was engaged in operating a railroad from Denison to Galveston, with various branches and feeders, and was a common carrier for hire in the state of Texas, being the owner of and in control of a railroad as above set out. That the defendant the American Express Company, along with three other express companies, the Pacific Express Company, the Wells-Fargo Express Company, and the United States Express Company, were each and all engaged in the express business in the state of Texas, and were carrying on such business as a common carrier for hire over the various lines of railway within the state of Texas, and were in active competition with each other in such express business, that they, the said express companies, competed actively with each other in the rates charged, the promptness of service rendered for a given rate, the facilities afforded shippers and the public generally in dealing with them, in the courtesy of employees, and in the nature and character of the services rendered, and in many other ways were competing, and did compete and could compete with each other in the state of Texas.’”

The certificate here sets out the allegations of the petition as to a contract made between the parties defendant January 31, 1900, and as to that contract and the acts done under it, being in violation of the anti-trust act of 1899, which allegations are omitted for reasons hereinafter stated. The petition then proceeds to allege the making of a second contract as follows:

“‘Seventh. Plaintiff says that heretofore, to wit, on the 23d day of September, A. D. 1902, the defendant the Missouri, Kansas & Texas Railway Company of Texas entered into a contract and agreement with the defendant American Express Company, a joint-stock association doing business in the state of Texas, whereby it was agreed by and between said railway company and said express company, among other things, as follows:

“‘(a) That the railway company agreed to transport all the express matter of the express company to and from all stations upon its lines of railroad and branches which were then owned and operated by it and which might thereafter be owned and operated by it during the life of said contract.

“‘(b) The railway company further agreed that “none of its employees for himself, or for the railway company, shall be allowed during the continuance of this agreement to transmit money, valuable packages, goods or merchandise of any kind whatsoever, except regular passengers’ baggage, and supplies for the railway company’s eating houses upon the passenger trains of the said railway company, except that the railway company reserves the right to transport dogs in its passenger trains when accompanied by the owner, and also to transport corpses.”

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“(c) It was further agreed that the railway company would not contract with any party or parties to do an express business over said road, or any portion thereof, during the existence of the agreement.

“(d) It was further agreed that, if the railway company constructed, leased, operated, or acquired other lines during the life of the agreement, the express company should have the same exclusive facilities over all such lines in so far as the railway company could legally grant such facilities; “it being understood that if the railway company by its trackage arrangement with other railway companies which it may deem best to make hereafter, or if it compelled by legislation or judicial proceedings, to grant to any other express or transportation company facilities for carrying on an express business on its lines, or any part of the same, the revenue derived from the facilities so afforded such other express or transportation company shall be credited to the express company in its payment provided for under the terms of the agreement.” And it was further agreed that the compensation to such other transportation company or companies should not be less than the compensation provided for by the contract to be paid to the express company for the same service.

“(e) It was further agreed that the express company would transport, free of charge, over its lines, matters of any kind, property of the railway company, when such shipments did not exceed 20 pounds in weight, between any points reached by said express company, and would charge on shipments exceeding 20 pounds in weight of the property of the railway company to and from any points reached by the express company off of the line of the railway company and the Missouri, Kansas & Texas Railway Company (of Kansas) 75 per cent. of its regular tariff on such shipments, and it was provided that the above should apply to the business of the Southwestern Development Company, “being an associated company of the railway company.”

“(f) The express company further agreed that it would not issue any local rates per hundred pounds between points on the railway company’s lines “which shall be less than one and one-half times the railway company’s freight rate per hundred pounds on the same commodity between the same points,” unless consent to the contrary had been obtained from the traffic manager of the railway company; but it was provided that the express company shall be permitted to make such rates between competitive points as will enable it to compete successfully with other express companies operating on other lines of railway, the express company agreeing to notify the railway company of any reduction of rates made on account of competition, and when such competitive rates are reduced to one and one-half times the freight rates of such commodity the express company agrees that no further reduction shall be made in such competitive rates without the consent of the railway company.

“(g) It was agreed that the sum of \$7,732.12 shall be paid by said express company quarterly to said railway company, and

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that if 50 per cent. of the gross receipts of such company from traffic on the lines thereof should be in excess of that sum that such 50 per cent. should be paid.

“(h) It was further agreed by and between said parties that said contract should become effective and be in force from and after the first day of February, 1903, and should continue in force for a period of 10 years.”

The petition then charges violations of the act of 1899 in the making and carrying out of this contract up to March 31, 1903, when the act of that year became a law, and proceeds:

“‘Ninth. Plaintiff says that after the 31st day of March, 1903, and up to and including the trial of this case, the defendant railway company and defendant express company aforesaid continued to treat said contract last aforesaid—that is to say, the contract entered into on the 23d day of September, 1902—as a valid and binding contract between said parties, and executed and carried out said contract.

“‘Tenth. That by the execution and carrying out of the contract last aforesaid after the 31st day of March, 1903, said defendant railway company and said express company each became and was a trust, and each entered into a combination of capital, skill, and acts by and with persons, firms, corporations, and associations of persons, to wit, each defendant with the other for the following purposes:

“‘(1) To create and carry out restrictions in trade and aids to commerce and in preparation of products for market and transportation, and to create and carry out restrictions in the free pursuit of a business authorized and permitted by the laws of this state, and said combination tended to carry out and create such restrictions.

“‘(2) To prevent and lessen competition in the transportation of merchandise, products, and commodities, and to prevent and lessen competition in aids to commerce and in the preparation of products for market and transportation.

“‘(3) To fix and maintain a standard or figure whereby the price of articles or commodities of merchandise, products and commerce and the cost of transportation should be affected, controlled and established.

“‘(4) To make, enter into, maintain, execute, and carry out a contract, obligation, or agreement by which the parties thereto bound themselves not to transport any article or commodity below a common standard or figure, and by which they agreed to keep the price of such article, or charge for transportation, at a fixed or graded figure, and by which they might effect and maintain the price or cost of transportation and to preclude free and unrestricted competition among themselves in the transportation of articles or commodities of transportation, and by which they agreed to pool, combine, and unite an interest which they had in connection with a charge for transportation.

“‘Eleventh. Plaintiff further says that by the contract and agreement aforesaid and the execution and carrying out of the

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same after said 31st day of March, 1900, said railway company and said express company entered into and carried out an agreement (1) creating and tending to create and carry out restrictions in trade and commerce and aids to commerce and in transportation and in the free pursuit of business authorized and permitted by the laws of this state, and (2) fixing, maintaining, and increasing the price of merchandise, produce and commodities, and the preparation of products for market and transportation, and (3) preventing and lessening competition in the transportation of merchandise, produce, and commodities, and preventing and lessening competition in aids to commerce and in transportation, and (4) fixing and maintaining a standard and figure whereby the price and cost of transportation is affected, controlled, and established, and (5) by which the said parties bind, and have bound, themselves not to transport articles and commodities, and by which they agree to keep the price of charges for transportation at a fixed and graded figure, and by which they affect and maintain the price and cost of transportation and the cost of transportation between them and themselves and others, and to preclude a free and unrestricted competition among themselves and others in the transportation of articles and commodities and the business of transportation, and by which they agree to pool, combine, and unite their interest in connection with the charge for the transportation of express matter, whereby such charge is affected.

“‘And plaintiff says that by the execution of the contract aforesaid and the carrying out of same after the 31st day of March, A. D. 1903, said defendant railway company and said defendant express company each formed a trust and a monopoly and a conspiracy in restraint of trade, and thereby violated the laws of the state of Texas, and especially the act of March 31, 1903, and thereby each became liable to plaintiff for the penalties denounced and provided by said statute, to wit, the sum of \$50 per day for each day from and including the 1st day of April, 1903, to and including the date of the trial of this case, an aggregate of \$20,000 and for the sum of \$20,000 plaintiff now asks judgment against said defendant railway company, and for the sum of \$20,000 plaintiff asks judgment against said express company.

“‘Twelfth. That during the month of September, 1903, the railroad commission of Texas promulgated a general tariff of rates and classifications of freights and all express matter to be hauled by the express companies doing business in the state of Texas, such rates and classifications to govern in the transportation by said express companies of all express matter wholly within the state. That the defendant the American Express Company, together with the other express companies doing business in the state of Texas, applied for and obtained from the United States Circuit Court an injunction against the railroad commission of Texas, restraining them from promulgating or enforcing such rates and classifications. That such tariff was a

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general tariff and covered every sort of express matter. That said defendant express and said other express companies claim in their bill upon which they obtained such injunction that the railroad commissions is without authority of law to fix and regulate charges to be made by them. That they also claim that they had no right on various grounds to enforce such rates and classifications, and said suit has been pending since September, 1903, and is now pending and cannot be tried or finally disposed of by the court until January, 1905.

“‘And plaintiff prays for judgment severally against said defendants for the sums hereinbefore prayed to be adjudged against them respectively, and it prays for judgment for costs and for such other relief as it may be entitled to.’

“In view of the fact that we are reliably informed that there are 30 or more cases pending in the court below of practically the same nature as this case, and that are dependent upon a decision hereof, and in view of the public interest involved in the question, so that an early and final decision may be reached, we have concluded to certify the questions raised by the plaintiff's petition to your honorable court. However, there is one question pointed out in appellee's brief as supporting the ruling of the trial court which we have agreed upon. It is insisted by appellees that the trial court correctly sustained the demurrer, because the Attorney General in an action to recover penalties for a breach of the anti-trust statutes in question, so far as they affect railway and express companies, could not maintain the same without permission or consent of the railroad commission of Texas. The petition does contain an averment that the railroad commission did not give its consent to the bringing and filing of this suit; but it affirmatively appears upon the face of the petition that it was instituted under the consent and direction of the Attorney General. Without comment, or stating the reasons that have influenced us in the ruling, we deem it only sufficient to say that we are of the opinion that the Attorney General could maintain the action without the consent or permission of the railroad commission.

“It will be observed that the petition specially points out and calls the court's attention to the grounds relied upon as showing and indicating wherein the contract as described in the petition comes within the condemnation of the anti-trust acts of 1899 and 1903. Such being the case, we deem it unnecessary to make the questions propounded more specific than to merely ask the court whether the plaintiff's petition states a cause of action, and whether the trial court erred in sustaining the general demurrer. Therefore we propound to the Supreme Court the following question:

“Was the contract in question, as it is alleged and described in plaintiff's petition, in violation of either the anti-trust act of 1899 or of 1903, in any of the respects specially insisted upon by the plaintiff in the petition?”

Those allegations based upon the two contracts intended to

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show violations of the act of 1899 are omitted for the sake of brevity, because it was conceded at the argument that petition did not show that act had been violated. It may be stated, however, that the terms of the first contract alleged were, in substance, the same as those of the second. In view of the admission made by counsel for the state, which is regarded as proper, we deem it unnecessary to discuss the questions put with reference to the act of 1899, but content ourselves with answering that no violation of that act is shown. The act of 1903, p. 119, c. 94, so far as we need to consider its provisions, is as follows: "That a trust is a combination of capital, skill or acts by two or more persons, firms or corporations or association of persons, or either two or more of them for either, any or all of the following purposes: (1) * * * To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state. (3) To prevent or lessen competition in the * * * transportation * * * of merchandise, produce or commodities. (4) To fix or maintain any standard or figure whereby the * * * cost of transportation * * * shall be in any manner affected, controlled or established. (5) To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of the transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation or any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

To answer the questions certified, it is necessary only to bring to bear upon the contract alleged the first subdivision of the statute and inquire whether or not the contract shows a combination of capital, skill, or acts to create or carry out a restriction in the free pursuit of a business authorized or permitted by law; and in determining this we may further restrict the inquiry to the effect intended by the parties upon the business of other express

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companies. Whether or not a restriction in the pursuit of those businesses was contemplated must be determined by ascertaining their lawful scope in respect of the right of such companies to pursue them upon the railroads of the state. In 1885 it was decided by the Supreme Court of the United States that "railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled," and that "railroad companies are not obliged, either by the common law or by usage, to do more as express carriers than to provide the public at large with reasonable express accommodations, and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains." *Express Company Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791. This may be regarded as the rule of law existing in this state until 1887, when was enacted a statute now forming article 4540 of the Revised Statutes of 1895, which was evidently passed in order to remedy what the Legislature, agreeing with the views expressed by the judges who dissented in the *Express Company Cases*, regarded as a defect in the existing law. It reads as follows: "Art. 4540. Every railroad company operating a railroad within this state shall furnish reasonable and equal facilities and accommodations, and upon reasonable and equal rates, to all corporations and persons engaged in the express business, for the transportation of themselves, agents, servants, merchandise and other property, and for the use of their cars, depots, buildings and grounds, and for exchanges at points of junction with other roads." Unquestionably this authorized and permitted express companies to pursue their business on all the railways controlled by state legislation, with "equal and reasonable facilities and accommodations and upon equal and reasonable rates." Thus the scope of this business, as "authorized or permitted" by law, is defined, and any combination of the kind denounced by the anti-trust statute, the carrying out of which would limit or narrow such scope, is necessarily one to create or carry out a restriction in the free pursuit of the business. This proposition cannot be made plainer by any amount of elaboration. *F. W. & D. C. Ry. Co. v. State*, 87 S. W. 336, 12 Tex. Ct. Rep. 1002, 1003.

The contract in question shows by its own terms that its purpose was to secure to the express companies, as far as it was in the power of the parties to do so, the exclusive right to do an express business upon the railroad, and to exclude other express companies from the enjoyment of like rights. It is true that by clause (c) the railroad company only bound itself not to contract with others to do an express business on its road, and, if this were all, it might be urged that all of the equal and reasonable facilities, accommodations, and rates exacted by the law might be accorded without express contract; but the purpose to grant an exclusive right to the express company is made too plain for argument by the succeeding clauses. Clause (d)

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expressly calls the rights granted "exclusive facilities," and plainly evinces the understanding that they shall not be given to any one else unless such action be compelled by legislation or judicial proceedings, and that, should this be done, the express company shall have credit for the sums paid by other companies. This clause shows plainly the intention that the only express business to be conducted on this road should be that of the contracting express company, and that that company should receive the benefit of the earnings of the railroad company from the business of any other express companies which it might be compelled to admit to its lines, which stipulation is made, presumably, in return for sufficient considerations moving from the express company to the railroad company. The obstacle such an agreement interposes to the admission of other companies to the facilities given to them by the statute is easily understood, seeing that every other express company is to be charged for the facilities to be enjoyed by it the same price that the favored company is to pay as the consideration for everything the railroad company agrees to do for it, including the undertaking, in effect, to exact such prices from all other companies for the benefit of this one. We conclude that there was the purpose to create and carry out a restriction in the free pursuit of a business, and next inquire whether or not there was a combination of capital, skill, or acts to accomplish that purpose.

The capital, the skill, and the acts of the railroad company were employed in conducting its business of a common carrier, which include the transportation of the servants of the express company and the express matter controlled by it. The capital, the skill, and the acts of the express company were employed in conducting, as a common carrier, the express business upon the railroad. The two businesses, although the same instrumentalities are, to an extent, used by the two companies in forwarding each, may be kept distinct, and there is not necessarily a combination of any character in the mere fact that they are thus carried on. But when the two companies unite in the purpose defined, and frame their contract with a view to its accomplishment, all that is promised on one side being the consideration for all that is promised on the other, the combination of their capital, their skill, and their acts for the common purpose is complete. The capital, skill, and acts of each being employed in its business when they agree upon the unlawful purpose and to so direct their businesses as to effect that purpose, they necessarily combine to that extent the capital, skill, and acts by which such businesses are sustained. While the mere purpose without the combination does not constitute the offense, the formation of the purpose and the agreement upon a contract by which it is to be carried out, in the execution of which contract the capital, skill, or acts of both are to be used, does complete the offense. All of the power for mischief inherent in the union of two or more for the accomplishment of a purpose injurious to others is thus exerted, and this is the

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consideration that led the Legislature to prohibit such combinations for purposes which are not made unlawful when entertained by one.

The contract through which this combination was formed was made before the act of 1903 was passed, and the question whether or not there has been a violation of that act must be determined by inquiring whether or not it applies to such combinations formed before, but carried out after, it took effect. The language in which the offense is defined and described requires an affirmative answer. A trust is defined as a combination for certain purposes. Whenever, after the act begins to operate, such a combination is found to exist, it falls within the terms employed. All such combinations are declared by section 4 to be illegal, and are prohibited. This language makes their existence a violation of the act, and other sections impose penalties upon parties causing such violation. The fact that a combination may have been formed before the statute took effect is immaterial, if it is in active existence thereafter. The statute has no retroactive or ex post facto operation, and applies only to offenses occurring after its enactment. The offense does not consist in the formation and existence of the combination before the law went into operation, but in the persistence of the parties in it after it has become unlawful. This the terms of the act make reasonably clear when they define the existence of certain elements to constitute a trust, and provide that one of the elements may be the purpose "to carry out" restrictions and the like, and make the penalties provided (section 11) apply for each day the offense is "continued." That such is the correct interpretation of such statutes is held by the Supreme Court of the United States in *United States v. Freight Association*, 166 U. S. 342, 17 Sup. Ct. 540, 41 L. Ed. 1007. But it is said that this interpretation of the statute would render it unconstitutional, as impairing the obligation of a valid contract. The answer is that the state may, in the exercise of its police power, prohibit the continuance in the future of those things already in existence which are so injurious to the rights and interests of its citizens generally as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. The same power which may, upon sufficient occasion, destroy other property of the citizen to secure the general welfare, may, to the same end, destroy the binding obligation of contracts. The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere, and therefore the mere objection that an exercise of that power impairs the obligation of a contract does not reach the true question, which is whether or not the attempted exercise is within the scope of the power exercised. It is unnecessary in this case to go into any extended examination of the question as to the extent of this power. If we had before us a contract which was originally lawful and reasonable in itself, and which, although falling within the literal language of the

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statute, could not justly be regarded as so injurious to the state or its citizens as to afford reasonable grounds for its destruction, a different question would be presented. It is true that there are limitations upon the power of the Legislature to either strike down contracts already made, or unreasonably and arbitrarily to restrict the liberty of citizens in contracting in future; but there is no occasion for applying them here. This contract was, as we have seen, made in the face of a statute then existing, and was not a reasonable, and can hardly be said to have been a lawful, one, and it is wholly unnecessary to pursue an inquiry which might arise with reference to contracts of a different character.

The argument is advanced that, because of the existence of the laws creating the railroad commission and investing it with power to regulate the rates to be charged by railroad and express companies, combinations between them do not fall within the reason and purpose of the statute which we are considering and which was passed subsequently to those just referred to. The act of 1903 expressly deals with combinations affecting transportation, competition therein, and the cost thereof, and it is improbable that the Legislature intended to omit from its operation the two most prominent kinds of carriers engaged in transportation, combinations between whom would have greater effect on the things intended to be protected than the combinations of any other persons. Extensive powers are given to the railroad commission by which unjust practices among such carriers may be prevented or curtailed, and it is doubtless true, also, that there was no purpose in enacting laws to suppress trusts to interfere with the regulation by it of matters placed under its control. But it is certainly not unreasonable to suppose that the Legislature may have thought that further checks might be necessary or useful by way of penalties prescribed for combinations calculated to impede the carriers' full performance of their duties and to defeat the laws enacted to define and enforce those duties. The language of the statute undoubtedly embraces railroads and express companies, and no rule of construction would authorize the courts to take them out of its operation. A contention like this was advanced by the railroad companies in *United States v. Freight Ass'n*, *supra*, and *United States v. Joint Traffic Ass'n*, 171 U. S. 585, 19 Sup. Ct. 25, 43 L. Ed. 259, based on the federal anti-trust act and the interstate commerce act, with much greater reason in the provisions of those statutes than can be found in the terms of ours, but was held to be unfounded.

Finally, it is claimed that the petition fails to show a violation of the act of 1903, in that it does not allege that the features of the contract, constituting the unlawful combination, were carried out after the law went into effect. The natural meaning, or the reasonable intendment at least, of the allegation that, after the law was passed, the defendants "continued to treat said contract * * * as a valid and binding contract between said parties, and executed and carried out said contract," is that the whole contract

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was so treated. This was sufficient, at least, to meet a general demurrer.

While we have discussed the case upon the application of the first subdivision of the statute, the reasons we have stated lead obviously to the conclusion that there was also a combination for the purpose mentioned in the third subdivision. Questions much more far reaching would arise under the fourth and fifth subdivisions when applied to clauses (b), (f), and (g) of the contract, upon a discussion of which we find it unnecessary to enter. To do so would require a consideration of how far a railroad company, in adjusting its business to that of an express company to be carried on upon its road, may regulate the terms upon which it is to be done so as to protect itself and its own business; whether or not stipulations made for that purpose are reasonable, and, if so, valid, although coming within the general language of the subdivisions of the statute referred to, whether or not such questions could be determined from a mere inspection of the contract or would require for their decision the statement in the petition charging violations of the law of other facts upon which the legality of the things charged might depend, and probably other matters that need not be stated. These in most part have not been argued, and, as a decision of them is not essential to an answer to the questions asked by the Court of Civil Appeals, we deem it inadvisable to go further than we have done.

We answer that the petition showed a violation, in the particulars stated, of the act of 1903, and that the court erred in sustaining a general demurrer.

PITTSBURGH, FT. W. & C. RY. CO. v. SANITARY DIST. OF CHICAGO.

(Supreme Court of Illinois, Oct. 14, 1905.)

[75 N. E. Rep. 892.]

Eminent Domain—Pleading—Demurrer.—Where a petition for the condemnation of land is defective in not stating the purpose of the taking or the manner in which the land is to be used, the proper method of taking advantage of the defect is by demurrer.

Same—Exercise of Power—Scope of Judicial Inquiry.*—In a pro-

*For the authorities in this series on the questions embraced in the second head-note of the principal case, see *Ulmer v. Lime Rock R. Co.* (Me.), 13 R. R. R. 724, 36 Am. & Eng. R. Cas., N. S., 724 (public purpose, legislative determination subject to review by courts); foot-notes appended to *Zircle v. Southern Ry. Co.* (Va.), 9 R. R. R. 861, 32 Am. & Eng. R. Cas., N. S., 861; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.* (Wash.), 5 R. R. R. 160, 28 Am. & Eng. R. Cas., N. S., 160; *Savannah, etc., Ry. Co. v. Postal Tel. Cable Co.* (Ga.), 20 Am. & Eng. R. Cas., N. S., 917 (judicial discretion as to enjoining the condemnation of railroad right of way for telegraph line); *Bigelow v. Draper* (N. Dak.), 7 Am. & Eng. R. Cas., N. S., 771 (necessity a judicial question).

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ceeding to condemn land for public use the court may rightfully determine whether the petitioner has power to exercise the right of eminent domain, whether the property is subject to that right and is being taken for a public use, and whether the power is being used for taking an excessive amount of property, but cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or inexpedient.

Same—Property Subject to Condemnation.—Under Laws 1889, p. 129, § 8, giving to a sanitary district the right to acquire by condemnation any and all real property which it may require for its corporate purposes, a sanitary district has power to condemn land which is used by a railroad company as a freight terminal.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Condemnation proceedings by the Sanitary District of Chicago against the Pittsburgh, Ft. Wayne & Chicago Railway Company. From the judgment, defendant appeals. Affirmed.

Rehearing denied December 12, 1905.

Loesch Bros. & Howell, Herrick, Allen, Boyeson & Martin, and Wilson, Moore & McIlvaine, for appellant.

James Todd and Eddy, Haley & Whetten (P. C. Haley, and Dolph, Buell & Abbey, of counsel), for appellee.

HAND, J. This was a petition filed in the circuit court of Cook county by the Sanitary District of Chicago to condemn a narrow strip of land situated upon the west bank of the South Branch of the Chicago river, between the south line of Madison and the north line of Van Buren streets, in the city of Chicago, the east line of said strip being the center line of said river, to enable it to deepen, widen, and improve said river from Lake to Robey street, and thereby increase the flow of water from Lake Michigan through said river into its main artificial channel, which connects with the said South Branch at Robey street and extends to Lockport, without increasing the current in said river to a greater velocity than that provided for by the Secretary of war in the permit issued to said sanitary district by him, permitting it to divert a portion of the waters of Lake Michigan through said South Branch into its main channel. The appellants filed a motion to dismiss the petition on the ground of want of jurisdiction in the court to hear and determine the cause. The motion was overruled by the court, and a jury was impaneled to assess the appellants' compensation. The jury returned into court their verdict fixing the amount of appellants' compensation at \$1,389,940, upon which verdict a judgment was rendered; and the appellants having preserved, by proper exceptions, their objections to the ruling of the court in denying their motion to dismiss the petition for want of jurisdiction, an appeal has been prosecuted by them to this court to review the action of the trial court in holding that the sanitary district had the right to condemn, for the purposes aforesaid, said strip of land.

It is first contended the petition is insufficient in averment to

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give the court jurisdiction. The petition averred that the Sanitary District of Chicago was duly organized under "An act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers" (Laws 1889, p. 125), approved May 29, 1889, and in force July 1, 1889, and set out the powers conferred upon it as a sanitary district by virtue of the statute under which it was organized, and averred that it had power to condemn land to carry into effect the purpose for which it was organized. It also averred that in order to carry out the purpose of its organization and make effective the main channel by it constructed, it was necessary that it deepen, widen and improve the Chicago river, in order that it might comply with the statute of the state of Illinois and obtain a minimum flow through its channel of 300,000 cubic feet of water per minute, and such additional quantities of water as from time to time the population of the sanitary district might require, in order that the sewage of said district might be diluted in the manner and degree required by law. It also averred that its board of trustees, on June 19, 1901, had adopted a plan for the deepening and widening of the Chicago river between Lake street and Robey street, in the city of Chicago, and that said trustees, on the 20th day of May, 1903, passed an ordinance by the terms of which the said district had laid out and established its right for the deepening, widening and improving of said river between the south line of Madison and the north line of Van Buren streets in said city, and that in order to accomplish such purpose and make such improvement it was necessary that the petitioner acquire the strip of land sought to be condemned, which strip was described by metes and bounds. It was also averred that the sanitary district had obtained the permission of the Secretary of War to make the modifications, changes, and alterations in the Chicago river contemplated and provided for in the plan and ordinance referred to in the petition. The petition named a large number of persons and corporations, including the appellants, who it was averred had, or claimed to have, some interest in the premises sought to be condemned, and that the petitioner had been unable to agree with said persons and corporations as to the compensation to be paid them by it for said property. The persons and corporations who were named in the petition as interested in said premises, with the exception of the state of Illinois, were made defendants thereto, and the petition prayed that process might issue against said defendants, and that a jury might be impaneled to determine the just compensation to be paid the several defendants, occasioned by the taking of said strip of land, and for general relief. The sanitary drainage act provides, in express terms, that where it is necessary for a district organized under such act to acquire property by condemnation the proceeding shall be carried on under the eminent domain act; and section 2 of the eminent domain act requires the petition to state (1) the authority of the petitioner to exercise the right of eminent domain, (2) the purpose for which the property is sought to be

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taken, (3) a description of the property sought to be taken, and (4) the names of all parties interested in the property, as owners or otherwise, if known, if not known the fact should be stated, and to conclude with a prayer that the compensation to be paid the owner or owners be assessed. We are unable to see wherein the petition, upon its face, fails to comply with the statute and why it was not sufficient to give the court jurisdiction of the case. In *Suver v. Chicago, Sante Fe & California Railway Co.*, 123 Ill. 293, 14 N. E. 12, it was held that it is not necessary to state in the petition the particular manner in which the land is to be used, as that may be shown by the plans and specifications of the petitioner. The court did not err in declining to dismiss the proceeding for want of a sufficient petition.

It is next contended the petition should have been dismissed because, as urged by the appellants, it was not necessary for the petitioner to take the land sought to be taken, as the object of its organization could be effected without the taking of said strip of land; and the appellants sought to show, upon a motion to dismiss, by affidavits which the court refused to consider but struck from the files, that the petitioner could obtain the flow of water required to effect the object of its organization by taking a strip of land from the river bank opposite the land of the appellants, or by deepening, instead of widening, the river at the point where appellants' land was situated, or by constructing by-passes beneath the surface of appellants' land sought to be taken, to accommodate the flow of water required by the petitioner to effect the object of its organization. The question of whether it was necessary that the petitioner acquire title to the strip of land sought to be taken in order that the object of its organization might be effected was a legislative and not a judicial question, and was one to be determined by the trustees of the sanitary district and not by the court in which the condemnation proceeding was pending. The court in which such a petition is pending may rightfully determine whether the petitioner has the power to exercise the right of eminent domain, whether the property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or the expediency of the taking of the lands sought to be condemned; but where the right to condemn exists, and the property is subject to the exercise of the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, the court cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or inexpedient, as the determination of that question devolves upon the legislative branch of the government, and is a question which the judicial branch of the government cannot determine. *Smith v. Chicago & Western Indiana Railroad Co.*, 105 Ill. 511; *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill. 586, 30 N. E.

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1044, 17 L. R. A. 530; *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485. In the *Smith Case*, 105 Ill., on page 519, it was said: "It certainly was never contemplated by the Legislature that, where the petitioner has brought itself within the provisions of the statute, the right of condemnation can be defeated by simply showing, in the opinions of witnesses who may have no interest in or connection with the objects of the proceeding, that the land sought to be condemned is not necessary for the purpose stated. * * * On the other hand, the law having authorized such companies to take private property for public use, when one, by a proper petition, has brought itself strictly within the provisions of the statute, and the court can see, from the facts stated, the land sought to be condemned is not manifestly in excess of what would be reasonably necessary for the purpose stated in the petition, the court will not be authorized to interpose on the ground suggested." Also in the *Wiltse Case*, 116 Ill., on page 454, 6 N. E. 49: "The question of the necessity for the exercise of the right of eminent domain, and in what cases it will be exercised, within the constitutional restrictions, is legislative, and not judicial. And where the power has been delegated to an incorporation by the Legislature, the exercise of that power by the incorporation, within the scope and for the uses and purposes named in the legislative grant, will not be a proper subject for judicial interference or control, unless to prevent a clear abuse of the power." Also in *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill., on page 599, 30 N. E. 1047, 17 L. R. A. 530: "The municipal authorities have exercised the option or discretionary authority conferred upon them by the Legislature, and have provided for crossings in one, only, of the methods indicated in the statute, and have instituted condemnation proceedings in pursuance of the ordinances so passed by them. Their action in this regard is political or legislative in its character, and cannot be controlled by the courts. Appellant, in these cases, is asking a court of chancery to substitute its judgment for the judgment of the city council upon a question which belongs exclusively to the legislative branch of the government. They are asking a court of chancery to require the city council to repeal its ordinances for grade crossings and in the place thereof to adopt ordinances for viaduct crossings. Such relief as this cannot be granted under the facts disclosed in these records. * * * 'When the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain. That right is political in its nature, and not judicial. It belongs exclusively to the legislative branch of the government, and under our constitution the judiciary have nothing to do with it.'" And in *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill., on page 165, 48 N. E. 487: "Where the power to exercise the right of eminent domain has been delegated to an incorporation by the Legislature, the exercise of that power by the incorporation within the scope and for the uses and purposes named in the legislative grant will not be a

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proper subject for judicial interference or control unless to prevent a clear abuse of the power."

It is next said that the property sought to be taken at the time the petition was filed was devoted to railroad purposes, and it is urged for that reason it is not subject to be condemned. The strip sought to be taken is a part of a tract of land belonging to the appellants, bounded on the west by South Canal street, on the north by Madison street, on the east by the South Branch of the Chicago river and on the south by Van Buren street, and it is intersected by Adams and Jackson streets, which run east and west. The west 135 feet thereof is occupied by the Union Passenger Station, and the portion lying east of said 135 feet and west of said strip is occupied by the freight terminal of the appellants, and said strip is occupied by teamways and three short stub tracks which furnish means of access to the freight buildings of appellants located between said strip and the Union Passenger Station grounds. While no main tracks are located upon said strip, we think, for the purposes of this case, it may be admitted it is used by the appellants in connection with their freight terminal and devoted to railroad purposes. The law is well settled that where land is devoted to a public use it cannot be taken by condemnation for another public use unless the Legislature in express terms or by necessary implication has authorized it to be taken. The question here presented, therefore, is whether or not the statute under which the petitioner is organized in express terms or by necessary implication confers authority upon the petitioner, in order to effect the object for which it is organized, to condemn property which is in use by a railroad company as a freight terminal and similarly situated to the strip of land here in question. In *People v. Nelson*, 133 Ill. 565, 27 N. E. 217, when construing the statute under which the petitioner was organized, the court held that while said statute was general in its terms, it was a well known historical fact, and a fact abundantly shown by the terms of the act itself, that the general sanitary scheme provided for by the act was formulated mainly, if not exclusively, with reference to the sanitary conditions and needs of the city of Chicago and its environs, and that the act and its several provisions could not be properly construed without taking into account the peculiar situation of the territory which the proposed Sanitary District of Chicago was intended to embrace. And in *Lussem v. Sanitary District of Chicago*, 192 Ill. 404, 61 N. E. 544, there was involved the validity of certain bonds issued by the Sanitary District of Chicago, the proceeds from the sale of which were proposed to be used, in part, by the district in paying for deepening and widening the Chicago river, in compensating the owners of property situated along the banks of said river where the same was acquired for the purpose of widening the river, and in constructing bridges across the river where bridges were made necessary in consequence of changes made in the river by the work done therein by the sanitary district, it was held that the district had the power

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to take possession of the river, subject to the right of navigation and with the consent of the Secretary of War, for the purpose of widening and deepening the same, and that it might condemn such land situated upon the banks of the river as it might need to enable it to obtain the necessary flow in volume of water to comply with the statute under which it was organized, without increasing the velocity of the flow of the water beyond the velocity of flow provided in the permit of the Secretary of War permitting it to connect its main channel with the South Branch of the Chicago river; that is, to enable it to comply with the law under which it was organized and the permit of the Secretary of War. By section 17 of the sanitary drainage act the petitioner is authorized to enter upon, use, widen, deepen, and improve any navigable water way necessary to affect the object of its organization. This provision undoubtedly was intended to apply, and does apply, to the Chicago river. By section 8 of said act it is provided that such sanitary district may acquire, by purchase, condemnation or otherwise, any and all real property that may be required for its corporate purposes. By virtue of the provisions of said section 8 the sanitary district in express terms is given power to acquire, by condemnation, any and all real property which it may require for its corporate purpose. This language is broad and comprehensive, and is ample to authorize the petitioner to acquire, by condemnation, the title to the strip in question, if in the judgment of the trustees of the sanitary district its acquisition was necessary for the corporate purposes of the district.

It is however, contended by the appellants that the right to condemn property held for public use is not conferred upon sanitary districts by section 8, but by section 17 of said act, and it is said section 17 only authorizes the condemnation of a joint use of such property. We do not agree with this contention, but are of the opinion that section 8 authorized the petitioner to condemn any and all real property, which includes property held for a public use; and, while section 17 apparently covers the same subject, we find nothing therein which limits the power conferred by section 8, or which deprives the petitioner of the power, under that section, to acquire property held for a public use. Especially must this be true when it is remembered that the Sanitary District of Chicago is not a corporation for pecuniary profit, but a municipal corporation organized for the purpose of furnishing an outlet to the sewage of a great city and thereby protecting the health of its inhabitants, and that the act under which it was organized was passed especially with reference to the conditions which were known to exist in the territory which was to be embraced within said district when organized. The statute requires the sanitary district to provide a minimum flow of 300,000 cubic feet of water per minute, and the velocity of the flow was limited to 3 miles per hour, which was afterwards limited by the Secretary of War to $1\frac{1}{4}$ miles per hour. No water could be obtained except from Lake Michigan through the river, with its narrow, winding, and obstructed channel, which was

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lined with docks, railroads, and other improvements, and when the statute authorized the sanitary district to enter upon, use, widen, deepen, and improve the Chicago river, and gave it power to condemn any and all real property required for its corporate purposes, it manifestly intended to and did confer upon said sanitary district the power to condemn any and all property, whether devoted to the public use or not, located upon the banks of said river, which was necessary for it to possess and control in order that it might successfully widen, deepen, and improve said river, which clearly includes the property of appellants.

From a consideration of this record we have reached the conclusion that the petition filed by the petitioner was sufficient, that the question of whether it was necessary that the Sanitary District of Chicago should acquire the strip of property in question for a corporate purpose was a question the decision of which rested with the trustees of said district, and that section 8 of the sanitary drainage act is broad enough in its terms to authorize said district to acquire title to said strip by condemnation. We are therefore of the opinion that the circuit court had power, under said petition, to hear and determine said cause, and that that court did not err in declining to dismiss the petition for want of jurisdiction.

The judgment of the circuit court, declining to dismiss said petition, will therefore be affirmed.

Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v. UNION SPRINGS & N. RY. CO.

(Supreme Court of Alabama, Nov. 22, 1905.)

[39 So. Rep. 473.]

Corporations—Attacking Validity of Incorporation—Eminent Domain.—That the certificate of incorporation of a railroad, issued by the Secretary of State, does not contain the names of the incorporators who signed the declaration of intention to form a corporation, required to be filed by Code 1896, § 1157, cannot be urged to defeat condemnation proceedings instituted by the purported corporation which acts under the certificate, although Code 1896, § 1163, empowers a railroad corporation to condemn land "when duly organized."

Railroads—Construction—Establishment of Terminus.—The incorporation of a railroad to run from one place "to" another place does not require it to stop at the corporate limits of the latter place; but it may fix its terminus at such location in that place as shall be agreed upon between it and the municipal authorities.

Same.—The fact that a railroad built a depot at a certain point in its terminal city and used it did not preclude it from extending its line to another point in such city, where the city had granted it a right of way to the proposed point when the road was contemplated and such point had been adopted as the terminus by a resolution of the railroad, and it had built its line in that direction from time to time as money could be obtained.

Same.—Where a railroad projects an extension as a continuance of its main line from one point in its terminal city to another point in

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that city, it is not necessary that it should own property at the latter point, in order for it to make its terminus there and condemn land in that vicinity.

Emient Domain—Purpose of Condemnation—Public Benefit—Presumption.*—The court must presume, in condemnation proceedings by a railroad, that the railroad, in building its line to a point originally fixed upon as a terminus, is acting for the purpose of serving the public.

Appeal from Circuit Court, Bullock County; A. A. Evans, Judge.

“To be officially reported.”

Application by the Union Springs & Northern Railway Company to condemn certain land belonging to the Central of Georgia Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Application by appellee to condemn certain property of appellant for right of way purposes. Appellant, among other things, filed a plea of nul tiel corporation, basing it upon the following facts: Seven persons filed a declaration with the Secretary of State, setting forth the allegations required by section 1157 of the Code 1896, and signing same. The Secretary issued to three of the signers a commission constituting them a “body of incorporators” to receive subscriptions to the capital stock of the Union Springs & Northern Railway Company, the name set forth in the declaration as the proposed corporation. On the coming in of their report, the Secretary of State issued a certificate to “the subscribers to the declaration of incorporation, their successors and associates,” without naming any of the subscribers.

G. L. Comer, for appellant.

Ernest L. Blue, for appellee.

SIMPSON, J. This is a proceeding by appellee to condemn a right of way over certain lots in Union Springs, Ala. The first proposition insisted upon by the appellant is that the appellee corporation was not duly organized according to our statutes, and consequently had no right to condemn the right of way. He claims that the corporation was not duly organized because the certificate of its organization does not contain the names of the incorporators. While it is true that section 1163 of the Code of 1896 does state that “when duly organized a corporation has power,” etc., yet to give that expression the strict construction contended for by the appellant would be to declare that all other powers of the corporation are dependent upon a literal compliance with all the requirements of the statute, and to abrogate the doctrine of de facto corporations, and to admit the plea of nul tiel corporations, and to admit the plea of nul tiel corporation in all suits brought by them. It is true that in 2 Cook on Corporations (5th Ed.) § 637, it is stated that, “where a railroad corporation attempts to acquire a right of way, the person whose

*See foot-note appended to preceding case.

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property will be affected thereby may oppose the acquisition of the right of way by showing that the company is not legally incorporated"; but a reference to the case on which that remark is based shows that the act under which the corporation professed to act required it to begin construction and expend 10 per cent. of its capital within five years, and specially declared that if it did not do so, "its corporate existence and powers should cease." Nothing had been done and there was no pretense of a de facto corporation. *Brooklyn, W. & N. Ry. Co. v. Broadway Ry. Co.*, 72 N. Y. 245. In the same section the learned author goes on to state that "if there is a law authorizing incorporation, and a company has attempted to organize under it, and has acted as a corporation, it is a de facto corporation, and its de jure existence can be questioned only by the state." This proposition is fully borne out by the great weight of authority, notwithstanding the remarks contra in the case of *N. Y. Cable Co. v. Mayor*, 104 N. Y. 43, 10 N. E. 332; *Independent Order, etc., v. United Order of Foresters*, 94 Wis. 234, 239, 240, 68 N. W. 1011; *Brown v. Calumet River Ry.*, 125 Ill. 600, 606, 18 N. E. 283; *Portland & Greenwood Turnpike Co. v. Bobb*, 88 Ky. 226, 228, 10 S. W. 794; *Wellington & P. R. R. v. Cashie, etc., Lumber Co.*, 114 N. C. 690, 19 S. E. 646. This court has declared that "a corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and the user of the rights claimed to be conferred by the law, when there is an organization with color of law and the exercise of corporate franchises"; and it also states that such de facto corporations "are under the protection of the same law and governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and the exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done by a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation and whose authority is usurped." *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 256, 31 South. 81, 90 Am. St. Rep. 901. See, also, *Bibb v. Hall*, 101 Ala. 80, 96, 14 South. 98. It is not necessary to decide whether or not the facts show a substantial compliance with the statute.

It is next insisted that, the appellee company having been built according to charter to Union Springs, and having fixed its terminus by establishing its depot, it cannot now extend its line to the proposed point near the waterworks. It is true that the railroad was organized to run from Ft. Davis to Union Springs, but such expression does not mean that it shall stop at the corporate limits. A reasonable interpretation, which is also in accordance with the universal custom in such cases, is that the

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railroad shall fix its terminus at such place in said city as shall be agreed upon between said railroad and the city authorities. Miles on Eminent Domain, § 115; Farmers' Turnpike Road Co. v. Coventry, 10 Johns. 389; Rio Grande R. R. v. Brownville, 45 Tex. 88. There is no proof that the railroad company ever intended to make its terminus at the point to which it has been running, except the mere fact that it built a depot there and has been using it. On the contrary, the ordinances of the city of Union Springs, running back to December, 1900, when this road was contemplated, granted the right of way to said company along the proposed line to a point on Powell street, near the waterworks, showing that the original intention was to run to that point. In addition, it is shown by the evidence that that was adopted as the terminus by resolution of the corporation, and a considerable portion of the line graded in 1901, and that it had been built in that direction from time to time as the money could be obtained. These being the facts, we hold that there is no merit in this contention.

It is next insisted that, as the appellee has no property at the point to which it is sought to run the road, and as the right of way sought would not connect in any way with the main line of appellee, this terminus is sought not for public use, but for private benefit. In regard to the first proposition, the line of the road as shown upon the map in evidence shows that this extension is a continuation of the main line. It is not necessary that the railroad should own property at a certain point in order to make its terminus there. It being a part of a public railroad, for public purposes, and it being the terminus originally fixed, as before shown, we must presume that the building of it to such point is for the purpose of serving the public.

We find no error in the record, and the judgment of the court is affirmed.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

ILLINOIS, I. & M. RY. CO. v. BORMS.

(Supreme Court of Illinois, Dec. 20, 1905.)

[76 N. E. Rep. 149.]

Eminent Domain—Special Benefits—Evidence.*—Where a railroad is seeking to condemn a right of way through defendant's farm, the fact that it intends to build a depot and elevator on land adjoining the

*For the authorities in this series on the question what constitutes benefits to the landowner from the construction and operation of a railroad on or near his property, see foot-notes appended to Shimer v. Easton & N. St. Ry. Co. (Pa.), 8 R. R. R. 901, 31 Am. & Eng. R. Cas., N. S., 901; Beveridge v. Lewis (Cal.), 3 R. R. R. 83, 26 Am. & Eng. R. Cas., N. S., 83; Guyer v. Davenport R. I. & N. W. Ry. Co. (Ill.), 2 R. R. R. 667, 25 Am. & Eng. R. Cas., N. S., 667.

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farm is not a special benefit, to be considered as reducing defendant's damages, where the deed conveying the land for the depot was made by a third party, and could not be enforced by the landowner, on failure of the railroad company to comply with its terms and build the depot.

Appeal from Will County Court; Arthur W. Deselm, Judge.

Condemnation proceedings by the Illinois, Iowa & Minnesota Railway Company against Frederick Borms. From a judgment for defendant, plaintiff appeals. Affirmed.

The appellant, the Illinois, Iowa & Minnesota Railway Company, filed its petition in the county court of Will county to condemn for a right of way .764 of an acre of land across the northwest corner of an 80-acre tract owned by appellee, Frederick Borms. Appellee filed his cross-petition, in which he alleged that the right of way sought to be condemned would cross the corner of his 80 acres in close proximity to certain buildings on his farm, thus causing danger from fire and injury from dust, cinders, ashes, gases, and smoke from its engines, thereby raising his rate of insurance; that his stockyards and his places for stacking and threshing grain were located near this corner; that the entrance to his yard would be a trifle over 100 feet from the highway; that the building and operation of the road would necessitate the removal of certain buildings, all of which would damage his property in the sum of \$2,500. Appellant demurred to the cross-petition, and the demurrer was overruled. Upon a trial the jury returned a verdict for \$150 for land actually taken and \$1,100 as damages to land not taken. Judgment was rendered on the verdict, and an appeal has been prosecuted to this court.

P. C. Haley, J. L. O'Donnell, and T. F. Donovan, for appellant.

C. W. Brown, for appellee.

WILKIN, J. (after stating the facts). It is first insisted by appellant as a ground of reversal that there is no evidence to sustain the value of \$150 placed by the jury upon the land actually taken. The jury did not view the premises, and we must look solely to the record for such proof. The appellee called six witnesses to testify to the value of the land taken. They placed its value from \$140 to \$170. Appellant insists that these amounts take into consideration some element of damage which should not have been considered. We think the fair interpretation to be given to the evidence of these six witnesses is that the land actually taken is alone worth the amount stated by them. While the witnesses for appellant placed the value of the land actually taken at a less figure than did the witnesses for appellee, yet we cannot say that the verdict in this regard is not fairly supported by the evidence.

Appellant offered in evidence a deed from Conrad Andres and wife to the railroad company, conveying a strip of land for a right of way through the premises of the grantors, together with an additional strip on which the company was to erect a depot and

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elevator. A resolution of the board of directors of appellant was also offered adopting a map of the right of way through Will county, showing the location of the depot and elevator on the Andres land, which adjoined the land of appellee. Appellant also sought to show by certain witnesses that by reason of the location of the depot and elevator on the Andres land the land of appellee would be benefited in excess of the damages, by affording him a closer and better market for his farm products. Objections were sustained to all of this evidence, and the court instructed the jury that in estimating the damages to appellee's land not taken they were not to consider such general benefits, if any, which might be derived from the construction and operation of the road—meaning by general benefits, those which the land would share in common with others in the same vicinity by making a better market or by affording conveniences for trade and travel. This ruling of the court is assigned as error. The consideration of this question raises the inquiry as to what are to be treated as general benefits and what as special benefits in such cases.

It is conceded by both parties that general benefits cannot be considered against damages, whereas special benefits may, and it is claimed by appellant that the location of a depot and elevator upon land adjacent to that of appellee would constitute such a special benefit as would entitle it to have the damages proportionately reduced. In the case of Metropolitan West Side Elevated Railway Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, we said (page 382 of 150 Ill., and page 1103 of 37 N. E., 26 L. R. A. 773): "Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause—that is, also specially benefited by the improvement—furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and, if it has, the extent of the depreciation in value. * * *

On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence all imaginary and merely speculative damages or benefits are excluded from consideration." This decision is sustained by an unbroken line of authority in this state, and the question, therefore, is whether the benefits sought to be proven by appellant were such as were general or special, within the rule there announced. The alleged benefits were founded upon a deed of conveyance to appellant made by a third party, in which it was agreed to build a certain depot and elevator. Appellee had nothing to do with that deed of conveyance. It was not binding upon him, nor could he enforce it; and all benefits which might be assessed against him could be defeated by a quitclaim deed or relinquishment of Andres to appellant.

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The court committed no error in its rulings on evidence and instructions to the jury. We find no reversible error in the record, and the judgment of the county court will be affirmed.

Judgment affirmed.

CHICAGO & E. I. R. Co. v. PEOPLE *ex rel.* SMITH, County Treasurer.

(Supreme Court of Illinois, Dec. 20, 1905.)

[75 N. E. Rep. 1021.]

Taxation—Sales of Land—Applications for Judgment of Sale—Objection.—Under Revenue Act (Hurd's Rev. St. 1903, c. 120) § 191, authorizing any person interested to object to the rendition of judgment and order of sale against land in which he is interested, a railroad may object to an application for judgment of sale against lands taxed in its name, without averring or providing that it is interested in the land.

Municipal Corporations—Taxation—Levy—Purposes of Tax—Necessity of Recital.—Where a tax levy ordinance refers to the appropriation ordinance, which specifies in detail the objects for which the tax is levied, the failure of the tax levy ordinance to itself specify the objects of the tax is not fatal.

Taxation—Of Railroad Property.*—Land adjoining the right of way of a railroad, which is used by the railroad as a reservoir from which it obtains water for its locomotives and other purposes connected with the operation of the railroad, is properly assessed as "railroad track" by the state board of equalization.

Same—Assessment by Local Authorities.—Where a portion of a tract of land belonging to a railroad and situated adjacent to its track is used for a reservoir, and is consequently assessable by the state board of equalization, and the balance of it is not so used, it is the duty of the local assessor to assess the balance only, and to so describe it as to identify it; and a tax based on his assessment of the entire tract is invalid.

Counties—Taxation—Levy of Additional Tax—Meeting of County Board.—Under Hurd's Rev. St. 1903, c. 34, § 27, authorizing the levy of a tax in excess of 75 cent on the \$100 by a vote of the people, and providing that, if a majority of the votes cast are for the additional tax, the county board shall have power to cause such additional tax to be levied and collected in accordance with the terms of the resolution, the county board should, if practicable, act immediately after it has been determined that the proposition for the levy of an additional tax has prevailed, and is not required to delay the tax levy until its following September meeting.

Same—Record of County Board.—In such case the record of the county board should show that the resolution for the additional tax was "adopted," and it is not sufficient for it to show that such resolution was "offered."

Appeal from Marion County Court; Charles H. Holt, Judge.

Application by the people, on the relation of Samuel J. Smith,

*For the authorities in this series on the subject of what is, and is not, taxable as part of a railroad company's right of way, or roadbed, or tracks, see foot-note appended to *People v. Illinois Cent. R. Co.* (Ill.), 13 R. R. R. 825, 38 Am. & Eng. R. Cas., N. S., 825.

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county treasurer, for judgment and order of sale against the lands of the Chicago & Eastern Illinois Railroad Company. From a judgment granting the application, defendant appeals. Reversed in part.

H. T. Dick and *L. M. Kagy* (*W. H. Lyford* and *E. H. Seneff*, of counsel), for appellant.

June C. Smith, for appellee.

HAND, J. This is an appeal from a judgment and order of sale of the county court of Marion county against certain lands in said county, taxed in the name of the appellant, for the taxes levied thereon for the year 1904.

First. The contention is made by appellee that the objections of appellant were rightfully overruled, as it is said the objections filed did not show the appellant was interested in the lands sought to be taxed. The lands were taxed in the name of appellant, or in the name of appellant and that of the Chicago, Paducah & Memphis Railroad Company, jointly. Section 191 of the revenue act (Hurd's Rev. St. 1903, c. 120) provides that any person interested therein may object, specifying the cause of objection in writing, to the rendition of judgment and order of sale against any land in which he is interested. The lands in question having been taxed in the name of appellant, it was not necessary it aver or prove it was interested in said lands. *Cincinnati, Indianapolis & Western Railway Co. v. People*, 205 Ill. 538, 69 N. E. 40. The court properly held the appellant had the right to object to the rendition of judgment and order of sale against said lands.

Second. The first tax objected to is a tax of \$108.58 in favor of the city of Kinmundy. This tax was levied in pursuance of a tax-levying ordinance which did not specify in detail the objects and purposes for which the tax was levied. It, however, referred to the appropriation ordinance, which did specify in detail the amount appropriated for each object and purpose. The tax-levying ordinance should have specified in detail each object and purpose for which the tax was levied. As, however, it in express terms referred to the appropriation ordinance, which ordinance contained such information in detail, the tax levy was not void by reason of such omission in the tax-levying ordinance, as the omission from the tax-levying ordinance of such detailed information did not affect the substantial justice of the tax, and the defect was cured by section 191 of the revenue act. The question presented here was raised and passed upon adversely to the contention of appellant in the case of *Spring Valley Coal Co. v. People*, 157 Ill. 543, 41 N. E. 874. That case is conclusive of the question raised here, and the court did not err in overruling the objections of the appellant to the rendition of judgment and order of sale for said city tax.

Third. The next tax objected to is a tax of \$8.12, sought to be collected from appellant upon 25.24 acres of land adjoining its right of way, about one-half of which land is used by appellant as a reservoir from which it obtains water for its locomo-

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tives and for other purposes connected with the operation of its railroad. Said land was assessed for the year 1904 by the state board of equalization as "railroad track," and we think it clear, under the repeated decisions of this court (*Chicago & Alton Railroad Co. v. People*, 98 Ill. 350; *Peoria, Decatur & Evansville Railway Co. v. Goar*, 118 Ill. 134, 8 N. E. 682; *Chicago & Alton Railroad Co. v. People*, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5; *People v. State Board of Equalization*, 205 Ill. 296, 68 N. E. 943; *People v. Atchison, Topeka & Santa Fe Railway Co.*, 206 Ill. 252, 68 N. E. 1059; *People v. Illinois Central Railroad Co.*, 215 Ill. 177, 74 N. E. 116), that the portion of said land used by appellant as a reservoir, within the meaning of the law, is "railroad track," and was taxable as such. If the portion of said land not used as a reservoir was not properly assessed as "railroad track," it was the duty of the local assessor to assess it separately from the portion thereof used as a reservoir, and to so describe the same that the portion assessed by him could be identified. This he did not do, but assessed the entire tract. The result of such assessment would be to lead to double taxation, which is not permissible. *Chicago & Alton Railroad Co. v. People*, 99 Ill. 464; *Wabash Railroad Co. v. People*, 196 Ill. 606, 63 N. E. 1084. The objection of appellant, for the reasons suggested, should have been sustained as to the tax levied upon said 25.24 acres of land.

Fourth. The next tax objected to is an additional county tax of \$444.68 attempted to be levied by the county board in excess of the 75 cents on the \$100 permitted to be levied by said county board for county purposes, and was sought to be levied by virtue of a vote of the people in accordance with the provisions of section 27 of chapter 34 of Hurd's Revised Statutes of 1903. It is first contended this tax was not levied by the county board at the proper time—that is, it was levied in January, 1905, when it should have been levied in September, 1905; and, secondly, that there is no evidence of a tax levy covering this tax made at any time by the county board, found in this record.

As to the first objection, it appears that the county of Marion was, by reason of its outstanding indebtedness, in need of more money than 75 cents on the \$100 would produce, and the county board at its September meeting, 1904, authorized the county clerk to call a special election to vote upon the proposition of an increased levy of 42 cents on the \$100. The election was called, and after a contest it was held the proposition to levy said additional tax of 42 cents on the \$100 had been adopted by the electors of said county. Thereupon the county clerk, upon the petition of seven supervisors, called a special meeting of the county board, which convened on the 7th of January, 1905, for the purpose of making said additional tax levy of 42 cents on the \$100, in accordance with the resolution passed by said board at its September meeting and the vote of the electors of the county, and that subsequent to the January meeting of said county board the county clerk of Marion county extended the said tax

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upon the books of the county. The section above referred to (section 27, c. 34, Hurd's Rev. St. 1903) provides: "If a majority of the votes cast upon the question are 'For additional tax,' then the county board shall have power to cause such additional tax to be levied and collected in accordance with the terms of such resolution"—i. e., the resolution of the county board fixing the amount of the additional tax required and the purpose for which the same is required, which resolution in this case was passed by the county board at its September meeting, 1904. We think it clear that said section contemplates that the county board, if practicable, will act immediately after it has been determined that the proposition for the levy of an additional tax has prevailed, and that the county board, as is contended by appellant, is not required to delay such tax levy until its following September meeting, and are therefore of the opinion the county board had power, on the 7th of January, 1905, to make said additional tax levy in accordance with the resolution of the board adopted at its preceding September meeting.

This brings us to a consideration of appellant's second objection to this tax. It appears from the record that the county board met in special session on the 7th of January, 1905, and that at its meeting on that day "the following proceedings were had, to wit: The following resolution was offered." Then follows a copy of the resolution relied upon by the appellee as an extension of the additional tax levy of 42 cents on the \$100 upon the taxable property of said county, which resolution refers to the preceding resolution of the county board passed at its September meeting, recites that the proposition for the additional tax levy had been carried at the election, and directs a tax levy of 42 cents on the \$100, in accordance with the resolution of the board passed at its preceding September meeting. The record, however, fails to show that said resolution was adopted by the county board. It shows only that it was "offered." The validity of said additional tax levy rests entirely upon the supposed action of the county board at said special January, 1905, meeting. If the county board at that time failed to adopt said resolution, then no tax levy for said additional tax was made. The appellee contends the resolution was adopted. This, perhaps, is true. The answer to this contention is, however, that the record does not show that fact, and we are bound by the record; and, as it does not appear the resolution "offered" was adopted by the county board, we are forced to hold the additional tax levy of 42 cents on the \$100 was never made, and for that reason the additional tax was illegal, and the county court erred in overruling the appellant's objection to said tax.

The judgment of the county court will therefore be reversed as to said tax for \$8.12 assessed against said 25.24 acres of land, and also as to said additional county tax for \$444.68, and affirmed as to the \$108.58 tax in favor of the city of Kinmundy, and judgment will be entered in this court against the appellant for said city tax, and the amount of that tax will be deducted from the

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deposit of the appellant in the hands of the county collector of Marion county, in accordance with the provisions of section 192 of the revenue act (Hurd's Rev. St. 1903, c. 120).

Reversed in part, and remanded.

CAHILL v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, Feb. 28, 1906.)

[76 N. E. Rep. 911.]

Master and Servant—Injuries to Servant—Employer's Liability—"Ways, Works, or Machinery."*—Where a servant was injured by the fall of certain bales of cotton which were alleged to have been negligently piled, such bales did not constitute a part of the master's "ways, works, or machinery," within the employer's liability act.

Same—Negligence of Foreman.—In an action for injuries to a servant by the fall of certain cotton, alleged to have been negligently piled

*For the authorities in this series on the question of the applicability of employers' liability acts, see foot-notes appended to *Mace v. Boedker & Co.* (Iowa), 17 R. R. R. 301, 40 Am. & Eng. R. Cas., N. S., 301 (what is "railroad work"); *Blanchard v. Detroit & M. Ry. Co.* (Mich.), 17 R. R. R. 591, 40 Am. & Eng. R. Cas., N. S., 591; foot-note appended to *Taylor v. Boston & M. R. R.* (Mass.), 16 R. R. R. 397, 39 Am. & Eng. R. Cas., N. S., 397 (application of automatic coupler acts; and whether cars are used moving interstate commerce); *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 16 R. R. R. 269, 39 Am. & Eng. R. Cas., N. S., 269 (under section 746, Rev. Code Civ. Proc. S. D., giving widow right of action for death of husband caused by tort of employee, the tort must have been committed within scope of employment); *Raisor v. Chicago & A. R. Co.* (Ill.), 16 R. R. R. 96, 39 Am. & Eng. R. Cas., N. S., 96 (Missouri statute, providing that defendants, including carriers of passengers, shall forfeit \$5,000 for wrongfully causing a death, is penal, and not enforceable in Illinois); *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372 (Wis. Rev. St. 1898, § 1816, making railroads liable for injuries to employees from negligence of fellow servants, does not apply to private logging railroads); *Whitlow v. Nashville, C. & St. L. R. Co.* (Tenn.), 15 R. R. R. 357, 38 Am. & Eng. R. Cas., N. S., 357 (Alabama statute, providing action for injuries to employees resulting in death, enforceable in Tennessee); *Lassiter v. Raleigh & G. R. Co.* (N. Car.), 15 R. R. R. 629, 38 Am. & Eng. R. Cas., N. S., 629 (in an action for the death of an employee, under N. Car. Priv. Laws 1897, p. 83, c. 56, § 1, plaintiff was not barred of the right to have the question as to whether defendant had the "last clear chance" to avoid the injury submitted to the jury by a rule of the company, which deceased had signed, and which, in part, fell within a clause of such statute preventing an employee from waiving the benefits of the law); *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343 (freight car used as passageway between car and freight depot was part of master's "ways, works or machinery," under Mass. statute); *Murphy v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 364, 37 Am. & Eng. R. Cas., N. S., 346 (section foreman in charge of hands transferring freight was a person entrusted with superintendence over them, within Mass. Statute); *Virginia & S. W. Ry. Co. v. Clowers* (Va.), 13 R. R. R. 170, 36 Am. & Eng. R. Cas., N. S., 170 (under Va. Const. § 162, relaxing stringency of existing precedents, in favor of railroad employees, a railroad

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in a freighthouse under direction of plaintiff's foreman, there was nothing to show who directed the bales to be placed where they were, or how long they had been in their then position. Plaintiff, when he took his skid away from the bales, which caused them to fall, did not act from any direction or assurance given by the foreman, but did so on his own motion, without looking to see how the skid stood against the bales and how its removal would affect the bales against which it was leaning. Held insufficient to establish negligence on the part of the foreman.

Exceptions from Superior Court, Middlesex County; Wm. Cushing Wait, Judge.

Action by one Cahill against the Boston & Maine Railroad Company. A verdict was directed for defendant, and plaintiff brings exceptions. Overruled.

company is liable to its locomotive engineer for his injuries caused by the failure of a telegraph operator to transmit an order sent out from the train dispatcher's office in regard to the movements of trains); *Gulf, C. & S. F. Ry. Co. v. Howard* (Tex.), 13 R. R. R. 175, 36 Am. & Eng. R. Cas., N. S., 175 (under Texas statute making servants intrusted with superintendence of other servants vice-principals, round house hostler was a vice-principal as to his assistants, but they as to him, were fellow servants); *Louisville & N. R. Co. v. Wade* (Fla.), 12 R. R. R. 22, 35 Am. & Eng. R. Cas., N. S., 22 (application of employers' liability act of Florida limiting application of fellow-servant rule); *Phinney v. Illinois Cent. R. Co.* (Iowa), 12 R. R. R. 14, 35 Am. & Eng. R. Cas., N. S., 14 (application of Iowa Code, § 2071, making railroads liable for negligence of fellow servants); *Northern Ala. Ry. Co. v. Mansell* (Ala.), 11 R. R. R. 186, 34 Am. & Eng. R. Cas., N. S., 186 (application of act embodied in Ala. Code 1896, c. 43); *Indianapolis & G. R. T. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214 (application of Burns' Rev. St. 1901, § 7083, subd. 2); *Sams v. St. Louis & M. R. Co.* (Mo.), 8 R. R. R. 396, 31 Am. & Eng. R. Cas., N. S., 396 (Mo. Rev. St. 1899, § 2873, not applicable to street railways, etc.); *Gulf & S. I. Ry. Co. v. Bussy* (Miss.), 9 R. R. R. 537, 32 Am. & Eng. R. Cas., N. S., 537 (application of provisions of Miss. Const. limiting application of fellow-servant rule); *Williams v. Iowa Cent. Ry.* (Iowa), 9 R. R. R. 20, 32 Am. & Eng. R. Cas., N. S., 20 (application of Iowa Code, § 2071); *Southern Ind. Ry. Co. v. Harrell* (Ind.), 9 R. R. R. 35, 32 Am. & Eng. R. Cas., N. S., 35 (negligence of person having authority to direct, application of Burns' Rev. St. 1901, § 7033); *Savannah, etc., R. Co. v. Williams* (Ga.), 7 R. R. R. 279, 30 Am. & Eng. R. Cas., N. S., 279 (application of §§ 2297 & 2323 of Ga. Civ. Code of 1895, limiting application of fellow-servant rule); *Mexican Nat. R. Co. v. Jackson* (C. C. A.), 7 R. R. R. 259, 30 Am. & Eng. R. Cas., N. S., 259 (effect of fact that injury occurred in Mexico on validity of contract exempting railway from liability under employers' liability act of Texas); *Keck v. Philadelphia & R. R. Co.* (Pa.), 9 R. R. R. 541, 32 Am. & Eng. R. Cas., N. S., 541 (Pennsylvania statute providing that any person who sustains injury while engaged in railroad work about any train of a company of which he is not an employee shall have the same right of action as if he were an employee); *Louisville & N. R. Co. v. Goss* (Ala.), 9 R. R. R. 129, 32 Am. & Eng. R. Cas., N. S., 129 (fireman in temporary charge of engine not in control of it, under Ala. statute); *Erie R. Co. v. Kane* (C. C. A.), 8 R. R. R. 423, 31 Am. & Eng. R. Cas., N. S., 423 (switch crew handling different trains in same yard are engaged in different branches of the service, under Ohio statute); *Williams v. Northern Lumber Co.* (Minn.), 2 R. R. R. 283, 25 Am. & Eng. R. Cas., N. S., 283 (application of Minn. statute creating liability for negligence of fellow servant);

*Cahill v. Boston & M. R. R**H. N. Allin*, for plaintiff.*Richardson, Trull & Wier*, for defendant.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff while in the defendant's employ. The plaintiff was employed in and about the defendant's freighthouse, and it was a part of his duty to open cars that were loaded, and to take a skid from the freighthouse and place it so that it formed a bridge between the car and the freighthouse, across which men took the freight from the car into the freighthouse. On the morning of the accident the plaintiff opened a car and went into the freighthouse to get a skid. He took one that was leaning up against a row of cotton bales, and as he took it away the bales fell over on to him, causing the injuries complained of. He testified that he took the skid as he usually did. The plaintiff con-

Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 4 R. R. R. 772, 27 Am. & Eng. R. Cas., N. S., 772 (common-law liability not enlarged by Ind. statute, but restricted, so that injured employee cannot recover unless he was obeying a superior at the time of the accident); *Bussey v. Gulf & S. I. R. Co. (Miss.)*, 4 R. R. R. 504, 27 Am. & Eng. R. Cas., N. S., 504 (application of fellow servant act of Mississippi); *Jensen v. Omaha & St. L. R. Co. (Iowa)*, 4 R. R. R. 46, 27 Am. & Eng. R. Cas., N. S., 46 (car cleaner entitled to recover as a fellow servant hostler, under fellow-servant act of Iowa); *Weaver v. Philadelphia & R. Ry. Co. (Pa.)*, 3 R. R. R. 198, 26 Am. & Eng. R. Cas., N. S., 198 (employee of iron company, while loading cars, fellow servant of trainmen, under Pa. statute); note, 9 Am. & Eng. R. Cas., N. S., 9 (application of fellow-servant act of Iowa); note, 9 Am. & Eng. R. Cas., N. S., 97 (application of fellow-servant act of Massachusetts); note, 9 Am. & Eng. R. Cas., N. S., 481 (application of fellow-servant act of Wisconsin); note, 12 Am. & Eng. R. Cas., N. S., 703 (application of fellow-servant act of Kansas); note, 12 Am. & Eng. R. Cas., N. S., 735 (application of fellow-servant act of Florida); *Cannon v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 9 Am. & Eng. R. Cas., N. S., 12 (car-inspectors, application of fellow-servant act of Iowa); *Kansas City, etc., Ry. Co. v. Becker (Ark.)*, 8 Am. & Eng. R. Cas., N. S., 757 (application of fellow-servant act of Arkansas); *Keatley v. Illinois Cent. R. Co. (Iowa)*, 9 Am. & Eng. R. Cas., N. S., 1 (application of fellow servant act of Iowa); *Fairman v. Boston & A. R. Co. (Mass.)*, 9 Am. & Eng. R. Cas., N. S., 83; *Pittsburg, etc., Ry. Co. v. Montgomery (Ind.)*, 9 Am. & Eng. R. Cas., N. S., 792 (application of Massachusetts statutes); *Mexican Cent. Ry. Co. v. Glover (C. C. A.)*, 21 Am. & Eng. R. Cas., N. S., 272 (application of Mexican Railroad Act.); *Akeson v. Chicago, B. & Q. R. Co. (Iowa)*, 11 Am. & Eng. R. Cas., N. S., 430; *Reddington v. Chicago, M. & St. P. R. Co. (Iowa)*, 11 Am. & Eng. R. Cas., N. S., 440 (application of Iowa statute); *Cowen v. Ray (C. C. A.)*, 21 Am. & Eng. R. Cas., N. S., 531 (liability for death of fireman in collision caused by failure of brakeman of other train to place danger signal on track, under statute of Indiana); *Kreuzer v. Great Northern Ry. Co. (Minn.)*, 21 Am. & Eng. R. Cas., N. S., 912 (question for jury whether work of clearing wrecked car from track, causing its roof to fall upon section hand, was being executed so as to expose him to peculiar hazards, within meaning of Minn. Gen. St. 1849, sec. 2701, making railroads liable for negligence of fellow-servant rule); *Southern Ry. Co. v. Moore (Ala.)*, 20 Am. & Eng. R. Cas., N. S., 896 (ropes do not constitute a part of the ways, machinery, etc., of a railroad, within meaning of employer's liability act of Alabama).

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tends that there was evidence of negligence on the part of the defendant and its superintendent in respect to the way in which the bales of cotton were placed. At the close of the evidence the court ruled, at the request of the defendant, that the plaintiff was not entitled to recover, and directed a verdict for the defendant. The case is here on exceptions by the plaintiff to the ruling thus made and the verdict thus directed.

We think that the ruling was right. It is possible that some of the reasons given for it may not have been entirely sound, but we think that the ruling itself was correct. There was no evidence of negligence on the part of the defendant. The bales of cotton as they were piled or stood in the freighthouse did not constitute a part of the ways, works, or machinery. *Lynch v. Allyn*, 160 Mass. 248, 252, 35 N. E. 550, et seq. It is not contended that they did. The negligence relied on is that of a superintendent, or foreman, one Baker. There was evidence tending to show that the usual way of placing or piling bales in the freighthouse was to stand them up in a tier against a bulkhead, as it was called, which consisted of three bales of cotton—two laid down on the floor, and the other on top of them. And the negligence complained of is that the foreman either directed or allowed the bales that fell to be placed on end leaning against each other without a bulkhead to support them, or that he suffered them to stand in that way after they had been so placed without his direction. It is difficult to see how, if we understand the situation correctly, a bulkhead would of itself necessarily prevent the bales from falling. They might have been so placed against each other that even with a bulkhead the removal of the skid would cause them to fall. The plaintiff took the skid away without making any examination to see if it could be safely done. He knew that freight was liable to be moved in the freighthouse by other employees and by teamsters. And, though acting within the scope of his duty in doing what he did, he acted of his own motion, and not from any direction or assurance given by the foreman or any one else.

Ordinary prudence would seem to have required that he should not take the skid away without looking to see how it stood against the bales, and how its removal and what effect its removal would have upon the bales against which it was leaning. Further, there was nothing to show who directed the bales to be placed where they were, or how long they had been in the position in which they were. For aught that appears, their position might, as already observed, have been changed by other employees or by teamsters coming to the freighthouse for freight, without any knowledge on the part of the foreman and under such circumstances that no negligence could be fairly imputed to him for suffering them to remain in the position in which they were, even if we assume that it might have been found to be negligence on his part to leave the bales in such a position that the removal of the skid would or might cause them to fall. See *Fitzgerald v.*

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B. & A. R. R., 156 Mass. 293, 31 N. E. 7; Burns v. Washburn, 160 Mass. 457, 36 N. E. 199; Thompson v. Norman Paper Co., 169 Mass. 416, 48 N. E. 757.

Exceptions overruled.

ATLANTIC COAST LINE R. CO. v. RYLAND.

(Supreme Court of Florida, Division B, Dec. 19, 1905.)

[40 So. Rep. 24.]

Master and Servant—Negligence of Fellow Servant—Statutory Liability.*—Under the provisions of chapter 3744, p. 117, Laws of 1887 (section 2346, Rev. St.), and chapter 4071, p. 113, Laws of 1891, authorizing recovery by one employee of a railroad company of damages for injury received by the running of its locomotives, cars, or other machinery through the negligence of a co-employee or fellow servant, the injured employee, in order to recover, must himself be entirely free from fault or negligence. He must do nothing to contribute to his injury, and must neglect to do nothing to prevent the consequence of the negligence of the other servants. Any negligence of the plain-

*For the authorities in this series on the subject of the effect of the contributory negligence of, or assumption of risk by, the injured servant on the right to recover under an employers' liability act, see *Mobile, J. & K. C. R. Co. v. Bromberg* (Ala.), 14 R. R. R. 823, 37 Am. & Eng. R. Cas., N. S., 823 (assumption of risk no defense under federal automatic-coupler act); *Hedrick v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 318, 37 Am. & Eng. R. Cas., N. S., 318 (under Virginia statute, brakeman's mere knowledge of existence of overhead bridge, by which he was killed, could not defeat recovery for his death); *Norfolk & W. Ry. Co. v. Cheatwood* (Va.), 13 R. R. R. 850, 36 Am. & Eng. R. Cas., N. S., 850 (effect of employer's knowledge of defects, under Va. Code 1904, p. c. c. l. ix, and Va. Acts 1901-02, p. 335, c. 322); *Harrill v. South Carolina & G. E. R. Co.* (N. Car.), 12 R. R. R. 725, 35 Am. & Eng. R. Cas., N. S., 725 (knowledge of defect on part of both railroad and its injured employee, effect of under S. Car. Const.); foot-note appended to *Denver, etc., R. Co. v. Arrighi* (C. C. A.), 12 R. R. R. 680, 35 Am. & Eng. R. Cas., N. S., 680 (effect of contributory negligence or assumption of risk on right to recover for violation of automatic-coupler acts); *Barksdale v. Charleston & W. C. Ry. Co.* (S. Car.), 8 R. R. R. 600, 31 Am. & Eng. R. Cas., N. S., 600 (conductor injured by reason of unsafe cars not prevented from recovering by South Carolina Const., Art. 9, § 15, unless he would have regarded them as unsafe if he had been exercising ordinary prudence); *Mott v. Southern Ry. Co.* (N. Car.), 6 R. R. R. 444, 29 Am. & Eng. R. Cas., N. S., 444 (doctrine of assumption of risk rendered inapplicable by statute of North Carolina); *Kilpatrick v. Grand Trunk Ry. Co.* (Vt.), 4 R. R. R. 945, 27 Am. & Eng. R. Cas., N. S., 945 (constitutionality of statutes abrogating the doctrine of assumption of risk); *Cogdell v. Southern Ry. Co.* (N. Car.), 4 R. R. R. 39, 27 Am. & Eng. R. Cas., N. S., 39 (assumption of risk as a defense under employers' liability act of North Carolina); note, 18 Am. & Eng. R. Cas., N. S., 696 (contributory negligence); *Coley v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 885 (assumption of risk and contributory negligence under statute of North Carolina); *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622 (effect of constitutional provision that servant's knowledge of defect

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tiff in such a case, however slight, that contributes in an appreciable degree to the cause of the injury, defeats a recovery.

Same—Assumption of Risk.†—Where an employee of a railroad company knowingly uses defective machinery, he cannot recover damages for injuries resulting therefrom.

Same.‡—Where a railroad employee sues the company for damages resulting from a defective hand car, and it is shown that he knew of the defective condition of the car, but nevertheless made use of it, such fact is fatal to his recovery, and it makes no difference that he made use of it under the immediate command of a superior employee.

Same—Duty of Section Foreman.—A section master, or assistant section master, in temporary charge of a hand car, must note such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it if it be obviously unsafe; otherwise, he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused; and whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer, as well as to his own credit.

Same—Contributory Negligence.—The commander of a hand car ought to see to it that the employees under his orders do their duty. If they operate the propulsive machinery of the car improperly, or move it at too high a rate of speed, or do anything else that endangers the safety of the persons on the car, he should interpose promptly and prevent it. If he fails to do so, then he himself is guilty of such negligence as will defeat his recovery for injury to himself resulting from such improper conduct of the employees under him. If the car is not in a condition to be run safely, he should not run it at all. He stands to the company in a relation of trust, and should be faith-

in appliance used by him and causing his injury shall be no defense in action for such injury); Louisville, N. A. & C. Ry. Co. v. Wagner (Ind.), 14 Am. & Eng. R. Cas., N. S., 706; Pittsburg, C., C. & St. L. Ry. Co. v. Moore (Ind.), 14 Am. & Eng. R. Cas., N. S., 678.

†For the authorities in this series on the subject of the assumption of risks from defective appliances by railroad employees, see foot-notes appended to Cole v. St. Louis Transit Co. (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; foot-notes appended to Cincinnati, etc., Ry. Co. v. Robertson (C. C. A.), 17 R. R. R. 324, 40 Am. & Eng. R. Cas., N. S., 324; Denver & R. G. R. Co. v. Scott (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309.

For the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-notes appended to Southern Pac. Co. v. Hetzer (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; Cole v. St. Louis Transit Co. (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; foot-notes appended to Florence & C. C. R. Co. v. Whipps (C. C. A.), 17 R. R. R. 569, 40 Am. & Eng. R. Cas., N. S., 569; foot-notes appended to Mace v. Boedker & Co. (Iowa), 17 R. R. R. 301, 40 Am. & Eng. R. Cas., N. S., 301; foot-note appended to Dunn v. Oregon Short Line R. Co. (Utah), 16 R. R. R. 741, 39 Am. & Eng. R. Cas., N. S., 741; Southern Pac. Co. v. Gloyd (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to Southern R. Co. v. Logan (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to Philadelphia, etc., R. Co. v. Devers (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366.

‡For the authorities in this series on the subject of assumption of risks in doing dangerous work in obedience to orders, see foot-notes appended to Southern Ry. Co. v. Logan (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374.

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ful to its interests, as well as his own safety. A most important part of his duty is to supervise the employees under him.

Same—Defective Appliances—Negligent Use.—In a suit for damages for personal injuries against a railroad company resulting from the derailment of a hand car, where the declaration shows that the plaintiff was assistant section master or foreman in charge of such hand car and the other co-employees thereon, and that he permitted such other co-employees under him to so negligently or improperly operate such car as to derail the same, he cannot recover, and a demurrer to such declaration should be sustained; and where the declaration in such a case in a second count alleges the cause of the injury to have been the defective condition of the hand car, conjointly with the improper propulsion thereof by the co-employees under the command of the plaintiff, and such declaration, in describing the alleged defects in such hand car, shows that its defective condition must have been patent and obvious to the most casual observer, there can be no recovery, and a demurrer to such declaration should be sustained, even though such declaration alleges that the defects in the car were unknown to the plaintiff.

(Syllabus by the Court.)

Error to Circuit Court, Osceola County; Minor S. Jones, Judge.

Action by Harry L. Ryland against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Sparkman & Carter, for plaintiff in error.

Alex St. Clair-Abrams, for defendant in error.

TAYLOR, P. J. The defendant in error, hereinafter referred to as the plaintiff, sued the plaintiff in error, hereinafter referred to as the defendant, in an action on the case for personal injuries resulting from alleged negligence, in the circuit court of Osceola county, and recovered judgment for \$5,000, from which the defendant takes writ of error here. The declaration in the case is as follows:

“For that, whereas, the plaintiff on the 2d day of September, A. D. 1903, was in the employ of the defendant, the Atlantic Coast Line Railroad Company, a corporation doing business in the state of Florida, and was engaged in the performance of his duty as assistant foreman on a section force; that on the said 2d day of September, A. D. 1903, the plaintiff, with other servants of the defendant, was on a certain hand car on the track of its railroad in the county of Osceola, said car being furnished by the defendant and in use by plaintiff in the performance of his duties, and said car being propelled by manual labor, and it was the duty of the plaintiff to keep a lookout for trains approaching the direction of the said hand car. And the said plaintiff further says that while in the performance of this duty, and looking in the direction opposite to which the said hand car was going, he observed that the said hand car swayed violently to and fro, and, turning around, observed that one of the servants of the defendant corporation, whose duty it was to work part of the mechanism which propelled the said hand car, was working the same with his back turned the way the car was going, and that the said

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servant would carelessly and negligently pull with one hand for awhile, then suddenly, carelessly, and negligently change to the other hand, thereby causing the said hand car to run unevenly and sway violently, and to threaten the said car with being derailed; that the plaintiff thereupon instructed the said servant, whose name is unknown, to change his position and to pull steadily with both hands, but the said employee, instead of obeying the order of the plaintiff, at once again negligently and carelessly changed from one hand to the other, pulling the mechanism violently and unevenly, and by reason of said carelessness and negligence caused the car to sway violently and to become derailed, and this plaintiff, by reason of the negligence aforesaid, was violently hurled to the ground (the plaintiff being entirely without negligence or fault on his part), and plaintiff sustained great and serious injury, to wit: Fracture of the large bone of the right leg, known as the 'tibia,' at the lower extremity thereof, further known as the 'internal malleolus'; the fractured portion being of considerable size, ununited, and displaced downward. Also fracture of the lower extremity of the small bone, known as the 'fibula,' on the outer side of the leg, the broken portion driven inward, union taking place with the formation of a large amount of callous or new bone between said bones and the first bone of the ankle, known as the 'astragalus,' rendering movement impossible and causing a total loss of the joint and consequent crippling of plaintiff for life. And the plaintiff was confined to the hospital for several months, and suffered great pain and anguish, and still suffers great pain, and was and is permanently injured, to the damage of the plaintiff in the sum of \$10,000. Wherefore the plaintiff brings this his suit and claims \$10,000 damages.

"Second Count.

"And for that, whereas, on the 2d day of September, A. D. 1903, the plaintiff was a servant and employee of the defendant, the Atlantic Coast Line Railroad Company, and held the position of assistant foreman of a section force; that in the performance of his duties as such assistant foreman it was necessary to use a hand car, propelled by machinery worked by hand. And the plaintiff says it was the duty of the defendant to supply a hand car reasonably safe, and with its machinery in reasonably good order; but the plaintiff says that the defendant, regardless of its duty in this regard, furnished and supplied to the plaintiff a certain hand car whose machinery was defective, in that the running gear was loose and caused the car to sway violently when it was propelled, and the wheels of said car were also not in reasonably good condition, the flanges being so worn as to cause the said car to become easily derailed. And the plaintiff says, at the time of and before the inflicting of the injuries upon him hereinafter mentioned, he did not know and was not informed of the defective condition of the said car; that on said 2d day of September, A. D. 1903, while in the county of Osceola, on the track of defendant's railroad on said car, as it was his duty to be,

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and while said car was being propelled by the other servants and employees of the defendant, and while this plaintiff was in the performance of his duty looking out for approaching trains of the defendant, one of the defendant's servants, propelling said car, carelessly and negligently propelled the same with one hand and then suddenly changing to the other hand, whereby the said car, by reason of the negligence and carelessness of the said employee, swayed violently to and fro, and the running gear of said car being loose and not in reasonably good condition, and the flanges of the wheels of said car being worn, and not in a reasonably safe condition, and by reason of the combined negligence of the defendant's servant and the defective condition of the said hand car, said car was derailed and thrown from the track, and the plaintiff was hurled violently to the ground, and sustained injuries, to wit: Fracture of the large bone of the right leg, known as the 'tibia,' at the lower extremity thereof, further known as the 'internal malleolus'; the fractured portion being of considerable size, ununited, and displaced downward. Also fracture at the lower extremity of the small bone, known as the 'fibula,' on the outer side of the leg, the broken portion driven inward, union taking place with the formation of a large amount of callous or new bone between said bones and the first bone of the ankle, known as the 'astragalus,' rendering movement impossible and causing a total loss of the joint and consequent crippling of plaintiff for life; the plaintiff being entirely without fault or negligence on his part. And the plaintiff says that by reason of the injury aforesaid he was confined to the hospital for several months, and suffered great pain and anguish, and still suffers great pain, and was and is unable to follow or perform his usual avocation, and was and is permanently injured for life, to the damage of the plaintiff in the sum of \$10,000. Wherefore the plaintiff brings this his suit and claims \$10,000 damages."

The defendant demurred to this declaration on the following grounds:

First. That each count in said declaration is argumentative, and not certain.

Second. That neither count in said declaration states a cause of action.

Third. That the plaintiff shows by each count of the declaration that any injury received by him was caused from risks assumed by said plaintiff in his employment.

Fourth. The said plaintiff shows by his declaration that he was in charge of his co-laborers at the time of the alleged injury and was responsible for their acts, and that it was through his own fault he was injured.

This demurrer was overruled by the trial judge, and such ruling is assigned as error.

At the common law the employer or master was not responsible in damages to an employee for injuries sustained through the negligence of a co-employee or fellow servant. This rule, however, was changed in Florida in the year A. D. 1887, when the

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Legislature enacted chapter 3744, p. 117, the second section of which chapter of the Laws was incorporated in the Revised Statutes of 1892 as section 2346 thereof, which is as follows: "If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery, and no contract which restricts such liability shall be legal or binding."

This provision of law was adopted here totidem verbis from the statutes of the state of Georgia. Section 2323, vol. 2, Georgia Code, compilation of 1895. Besides our adoption of the terms of the statute itself, we also adopted, as an integral part of the same, any known and settled construction that had been placed thereon by the courts of the state from which it has been adopted, in so far as that construction is not inharmonious with the spirit and policy of our own general legislation on the same subject. *Duval, Receiver, v. Hunt*, 34 Fla. 85, 15 South. 876; *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148.

The quoted section of chapter 3744, p. 117, Laws of 1887, brought forward as section 2346 of the Revised Statutes, seems to have been repealed by chapter 4071, p. 113, Laws of 1891, enacted at the same session of the Legislature that adopted the Revised Statutes, and the following section 3 of the last-mentioned chapter substituted in place thereof: "If any person is injured by a railroad company, by the running of the locomotives, or cars, or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding." The only apparent material change affected by the last-quoted section in the law as it was originally adopted here from the statutes of the state of Georgia seems to be to confine the right of recovery by an employee injured through the negligence of a co-employee, to cases where the injury complained of was caused "by the running of the locomotives, or cars, or other machinery" of the master company. This change in the law cannot, however, affect the case at bar, since the alleged injury here was caused or brought about in the operation or running of one of the defendant company's hand cars. Therefore the adjudications of our own and of the Georgia courts touching other features of the statute that remain unchanged by the said chapter 4071, Laws of 1891, will still govern.

In construing this statute our own court, and the Supreme Court of Georgia in numerous cases adjudged prior to the adoption of the statute here, have held that according to the express terms of the statute an employee, in order to recover from the master for an injury sustained through the negligence of a fellow servant, must himself be entirely free from fault or negligence. *Duval, Receiver, v. Hunt*, *supra*; *Florida Cent. & P. R.*

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Co. v. Mooney, *supra*, and numerous Georgia cases there cited.

In *Johnson v. Western & Atlantic R. R. Co.*, 55 Ga. 133, it was held that "where an employee of a railroad company knowingly uses defective machinery, he cannot recover damages for injuries resulting therefrom."

In *Central Railroad & Banking Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279, it is held that: "The servant of a railroad company, injured by the negligence of fellow servants, must, to recover damages from the company, show that he was in the exercise of ordinary care and diligence and without fault or negligence; that he did nothing to contribute to his injury, and neglected to do nothing to prevent the consequence of the negligence of the other servants."

In *Georgia Railroad & Banking Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613, it is held that "negligence of the plaintiff, however slight, which contributes in an appreciable degree to the cause of the injury, defeats a recovery."

In *Bell v. Western & Atlantic R. R.*, 70 Ga. 566, it is held that "where a railroad employee sued the company for damages resulting from a defective hand car, and the evidence for the plaintiff showed that he knew of the dangerous condition of the car, but nevertheless made use of it, such fact was fatal to his recovery." The same case holds that it does not alter the case that the employee knowingly undertook to use a dangerously defective tool under the immediate command of a superior employee.

In *Central Railroad & Banking Co. v. Kenny*, 58 Ga. 485, it is held that "a section master, in temporary charge of a hand car, must note such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it if it be obviously unsafe; otherwise, he cannot recover for an injury to himself which his declaration alleges to have been caused in part by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer, as well as to his own credit."

In *Kenney v. Central Railroad*, 61 Ga. 590, Judge Bleckley, delivering the opinion of the court, said: "The commander of a hand car ought to see to it that the employees under his orders do their duty. If they cannot safely work with coats on, he should require them to take their coats off. If they move the car at too high speed, he should interpose promptly, and prevent it. If the car is not in a condition to be run safely, he should not have run it at all. He stands to the company in a relation of trust, and should be faithful to its interests, as well as his own safety. A most important part of his duty is to supervise the employees under him."

The facts in the case last quoted from are quite similar to those

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alleged in the declaration before us, and under those facts the court held that the plaintiff employee could not legally recover.

Applying the principles thus adjudicated to the case as made by the two counts of the plaintiff's declaration, we think that the declaration shows on its face that the plaintiff employee of the defendant company was at fault, and negligent in the discharge of the duties devolving upon him as foreman or assistant foreman in charge of the laborer on the hand car whose alleged negligence caused the derailment whereby the plaintiff was injured. The first count bases the right of recovery upon the alleged negligent propulsion of the car by a co-employee who, according to the allegations of the declaration, was subject to the orders of the plaintiff as assistant foreman in command of the car. If he permitted such negligent propulsion of the car without promptly putting a stop to it, he was at fault for not so stopping it, and cannot recover for the resultant injurious consequences to himself.

The second count of the declaration bases the claim to recovery conjointly upon the alleged negligent propulsion of the car by the co-employee and upon the alleged defectiveness and worn and loose condition of the running gear and wheels of said hand car. What is said as to the first count applies with equal force to that feature of the second count that bases its claim to recovery on the alleged negligent propulsion of the car by the co-employee. The second count, it is true, alleges that the defective, worn, and loose condition of the hand car was not known to the plaintiff at the time of its use at the accident; but the description given in the declaration of the defects in the hand car shows upon its face that from the character of the defects as described they were perfectly obvious to the most casual observer, and that the plaintiff must have been negligent if he in truth failed to observe them, and in continuing to use an implement so obviously defective. Our opinion is that the plaintiff's declaration not only wholly fails to make a case where he can rightfully recover, but, on the contrary, affirmatively shows a case where the law forbids any recovery, and that the court below erred in overruling the defendant's demurrer thereto. As this disposes of the whole case, it is unnecessary to consider any of the other errors assigned. .

The judgment of the circuit court in said cause is hereby reversed, and the cause remanded, with directions to sustain the defendant's demurrer to the plaintiff's declaration. The costs to be taxed against the defendant in error.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

HOWARD *v.* CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky, Feb. 2, 1906.)

[90 S. W. Rep. 950.]

Master and Servant—Fellow Servants—Who Are.*—A railroad yard foreman is not a fellow servant of a switchman.

Same.†—An engineer, charged with the duty of operating an engine in switching in a yard, is not a fellow servant of a switchman.

Same—Rules of Employment—Duty of Servant.—A switchman in a railroad yard, who knows of the rule requiring employees to provide themselves with lanterns while at work at night, is required, when directed by the yard foreman to aid in "poling" a car at night, to provide himself with a lantern from the supply kept by the company in case the work is dangerous without a light, and the failure of the foreman to direct him to provide himself with a lantern is not negligence.

Same—Injury to Switchman—Negligence of Yard Foreman—Evidence.—Evidence in an action against a railway company for injuries received by a switchman in a yard examined, and held to show that the injuries were caused by the negligence of the yard foreman.

Same—Action for Injuries—Issues—Proof.—Proof that a switchman employed in a railroad yard was injured in consequence of the negligence of the yard foreman does not authorize a recovery, where the petition alleges that the engineer charged with the duty of operating the engine in switching was negligent, and that the place where the accident occurred was dark and dangerous.

Appeal from Circuit Court, Mason County.

"Not to be officially reported."

Action by Lewis F. Howard against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Thos. R. Phister, for appellant.

W. H. Wadsworth, for appellee.

SETTLE, J. Appellant sued appellee to recover \$1,995 damages for the loss of his arm, which was caught between a car and piece of timber and so crushed as to necessitate its amputation

*For the authorities in this series showing who are vice principals or superior servants, whose negligence other employees do not assume under the fellow-servant rule, see foot-note appended to *Struble v. Burlington, etc. Ry. Co.* (Iowa), 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259; for the superior-servant limitation of the fellow-servant rule, see extensive note appended to *Illinois Cent. R. Co. v. Elliott* (Ky.), 16 R. R. R. 145, 39 Am. & Eng. R. Cas., N. S., 145.

For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Hilton v. Fitchburg R. R.* (N. H.), 16 R. R. R. 757, 39 Am. & Eng. R. Cas., N. S., 757; foot-note appended to *Hooe v. Boston & N. St. Ry. Co.* (Mass.), 14 R. R. R. 288, 37 Am. & Eng. R. Cas., N. S., 288.

†For the authorities in this series on the question whether switchmen are fellow servants of trainmen, see foot-note appended to *Stevick v. Northern Pac. Ry. Co.* (Wash.), 17 R. R. R. 318, 40 Am. & Eng. R. Cas., N. S., 318.

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above and near the elbow. Upon the trial, and after appellant had introduced his evidence, the lower court gave a peremptory instruction directing the jury to find for appellee, and such was their verdict. Appellant then entered motion and grounds for a new trial; but the motion was overruled, and he has appealed.

It appears from the averments of the petition that appellant, at the time of receiving his injuries, was a switchman in appellee's depot yard at Maysville, and while so engaged he was, on March 25, 1904, at 4:30 o'clock a. m., ordered by one Stromberg, then acting as appellee's yard master or foreman, to assist in "poling" a freight car out of the way of an engine, in order that the latter might be removed from the side track, on which it was standing, and attached to a freight train on the main track then ready to leave its destination. The "poling" of a car is done by adjusting a heavy piece of timber, called a "pole," with one end on and against the front of the engine and the other against the car to be moved, then starting the engine forward, thereby pushing the car by the pole to a point that will allow it to be passed by the engine. Poling is resorted to for moving a car that is on a different track from that occupied by the engine, but is so in the way of the movements of the engine as to prevent its passing such car. On the occasion referred to the pole was brought forward by appellant as directed by the yard foreman, and they (appellant and the foreman) placed it in position, with one end against the pilot bar or head of the engine and the other against a bolthead of the car, the end at the engine being held in place by the yard foreman and the end at the car by appellant, who on account of the weight of the pole found it necessary to put his arm around it to hold it in place. While in this position appellant gave the yard foreman, who stood near the head of the engine, word to have the engine started, which he in turn gave the engineer, telling him to "kick the engine." Thereupon the engine was moved forward and the space between the pole and side of the car at the end supported by appellant's arm, being in a wedge shape, was so lessened by the pushing of the engine that his arm was caught between the pole and car and thereby crushed and broken. The petition alleges that he was injured by the negligence of the appellee in failing to provide a light for the work required of him, and by the negligence of its engineer in charge of the engine in moving it with too great speed and force. The answer of appellee contained a traverse, alleged that appellant, the engineer, and yard foreman, were fellow servants, and that appellant in the matter of receiving his injury was guilty of contributory negligence, but for which he would not have been injured.

Appellee's yard foreman was not a fellow servant of appellant, but his superior; for he was in authority over him, commanded his services, and directed him in the performance of his duties. We are also of the opinion that appellee's servant in charge of the engine was appellant's superior in the service in which they were both engaged. He was what is called in railroad parlance

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a "hostler"; that is, one charged with the duty of operating the yard engine in switching and making up trains and the like. Though his duties and work were confined to the depot yard, he was nevertheless as much an engineer as one operating an engine from point to point on appellee's lines of railroad. This court has too often decided that a railroad engineer is the superior of a brakeman or switchman in the same line of service for the doctrine to be questioned at this late day, and in *L. & N. R. R. Co. v. Moore*, 83 Ky. 684, it was held that a fireman in charge of the engine of a train, in the temporary absence of the engineer, was the superior of a brakeman on the same train, who was killed by his negligence in operating the engine.

It is insisted for appellant that as the work of poling the car was dangerous by reason of the darkness prevailing at the time, and that fact being known to appellee, it was its duty to provide him with light sufficient to enable him to do such work in safety, and also for signaling the engineer and fireman, and its failure to do so was gross negligence. Upon the cross-examination of appellant by counsel for appellee he admitted his familiarity with the rules adopted by it for the guidance of its employees and conduct of its business, and was caused to identify rule 7 which was read to the jury. That rule required appellee's employees to provide themselves with lanterns in such work as was performed by appellant and for giving necessary signals, and to keep them in good order and ready for immediate use. The only proper appliance for night signaling in railroading is a lantern. These according to the evidence were kept by appellee in its depot yard at Maysville, and could have been obtained by appellant without difficulty. We do not think the rule *supra* required appellant to furnish a lantern or other light at his own expense, but it did require him to provide himself with a lantern from the supply kept by appellee; and this he knew and should have done before undertaking the duty of poling the car, without any direction from appellee's yard foreman or engineer, and his failure to do so was a violation of the rule in question. *Alexander v. L. & N. R. R. Co.*, 83 Ky. 589; *L. & N. R. R. Co. v. Bocock*, 107 Ky. 233, 51 S. W. 580, 53 S. W. 262. If the work of poling a car without a light was dangerous, that fact was as obvious to appellant as to appellee, and as under the rule it was his duty to provide himself with a lantern, and he failed to do so, he cannot complain that appellee's yard foreman did not direct him to provide himself with a light. We do not, however, mean to say that his failure to provide himself with a light would have authorized the peremptory instruction in behalf of appellee, if as a matter of fact his injuries resulted from gross negligence on the part of the engineer in the manner of operating the engine.

The manner of appellant's receiving his injuries is not satisfactorily explained by the evidence. He testified before the jury that it resulted from getting his arm caught between the pole and the car; but a letter written by him to the yard foreman,

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Stromberg, during his convalescence, was produced by appellee's counsel, and upon cross-examination this letter was identified and its authorship acknowledged by appellant. In the letter appellant inquired of Stromberg: "Do you know how my arm got caught? I don't know whether it was caught between the pole and the car, or engine and car." It is not clear from appellant's own testimony whether his injury was caused by the too rapid motion of the engine or by its failing to stop after he called out to the yard foreman to have it do so. But from his testimony and that of the engineer, Neeper, whom he introduced, it is patent that he was injured by the negligence of Stromberg, the yard foreman, alone, and that such negligence was gross. It was admitted by appellant that he gave the signal to move by calling out, "All right, let her go!" He and the engineer both said neither could be seen by the other, and that Stromberg was between them and at the head of the engine. Both admit that as to the movements of the engine appellant was to signal to Stromberg and the latter to the engineer. Appellant testified that he signaled to stop the engine when he discovered that his arm was about to be caught, and that after he gave the signal the engine could have been stopped in time to prevent the mashing of his arm. The engineer testified that he did not hear appellant's cry to stop the engine and that Stromberg did not at any time notify him to stop; but he did finally get notice to do so from another employee of appellee standing near, who informed him of the accident to appellant, and upon receiving such notice he at once stopped the engine, which did not move more than two feet after he got notice to stop. According to the further testimony of the engineer, the engine had moved slowly, and not over four or five feet, after starting the car; and according to his and appellant's testimony the engine could have been stopped in time to prevent injury to the arm of the latter, if Stromberg had notified the engineer to stop it when appellant called to him to do so.

As said, the only negligence shown by the evidence was that of Stromberg, the yard master, and his negligence did not entitle the appellant to recover in the action, because it was not relied on as a ground of recovery. If appellant had contented himself with a general charge that his injury was caused by the gross negligence of appellee's servants, superior to him in authority, in operating the engine and directing the work, he could have recovered as well on account of the negligence of the yard foreman as of that of the engineer; but this was not done. Instead the negligence complained of is thus specified: The place was dark and dangerous, and there were no lights, and "the defendant, by its engineer, started the engine and negligently ran it forward with such speed, and brought plaintiff's arm and said pole close to and against said car so swiftly, that in the darkness plaintiff could not know and did not know the immediate danger until too late." As appellant's right to recover depended upon his proving the specific acts of negligence alleged, and there was no

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evidence to sustain them, there was no error in the giving of the peremptory instruction. *L. & N. R. R. Co. v. Clark's Adm'r*, 105 Ky. 571, 49 S. W. 323; *Sandy River, etc., Co. v. Caudill*, 60 S. W. 180, 22 Ky. Law Rep. 1175.

Wherefore the judgment is affirmed.

WALTERS v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, Oct. 5, 1905.)

[104 N. W. Rep. 1066.]

Insurance—Railway Relief Department—Waiver of Benefits.*—

When the certificate of membership in a railway relief department expressly provides that the indemnity therein provided shall be waived or forfeited by an action for damages against the railway company itself, the terms of the contract, and not the general rules of law relative to the election of remedies, will determine the consequences of such an election.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Red Willow County; Orv, Judge.

Action by Mary A. Walters against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. F. Cordeal, C. N. Boyle, and Berge, Morning & Ledwith, for plaintiff in error.

W. S. Maclan, J. W. Deweese, and F. E. Bishop, for defendant in error.

AMES, C. There is no dispute of fact, and but a single question of law, involved in this case, which is a proceeding in error, for the reversal of a judgment for the defendant in the district court. The action is against the relief or insurance department of the defendant company for a recovery by a beneficiary named in a certificate of membership on account of the accidental death of a member, and was submitted at the trial upon a stipulation of facts of which the following is a copy:

"It is hereby stipulated and agreed by and between the plaintiff and the defendant in the above-entitled action: (1) That the defendant, the Chicago, Burlington & Quincy Railway Company, is a corporation duly organized and existing under the laws of the state of Iowa, and that as such it has possession and control of the lines of railroad formerly owned and controlled by the Chicago, Burlington & Quincy Railroad Company, running from Chicago through the states of Illinois, Iowa, Nebraska, and else-

*For the authorities in this series on the question of the effect of the acceptance by a railroad employee of benefits from a relief department on his right of action against his company for personal injuries, see foot-note appended to *Chicago, etc., R. Co. v. Olson* (Neb.), 10 R. R. R. 209, 33 Am. & Eng. R. Cas., N. S., 209.

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where. That there exists in connection with said railway company what is known as the Burlington Voluntary Relief Department, originally organized by the employees of, and in connection with, the Chicago, Burlington & Quincy Railroad Company, and that the defendant railway company has succeeded to all the obligations and liabilities of the said railroad company in connection with said relief department, and is responsible for any and all obligations and liabilities of said railroad company under the same terms and conditions of contracts of members in the said relief department as they exist with the railroad company. (2) That on the 23d day of September, 1897, said Burlington Relief Department issued and delivered to one Edward Walters its certificate No. 40,991, which is attached hereto as a part hereof, marked 'Exhibit A.' That the said Edward Walters was a member of the Burlington Voluntary Relief Department in good standing at the time of his death. That he was killed by an engine and cars operated by the Chicago, Burlington & Quincy Railroad Company, while an employee of said company, on the 6th day of October, 1898. That the deceased at the time of his death left no widow or issue or father, but did leave surviving him his mother, the plaintiff herein, as his beneficiary under the terms and conditions of his membership in said relief department. (3) That under the contract and rules and regulations governing the membership of said Edward Walters he became a member of the second class, and his beneficiary was entitled to a death benefit in the sum of \$500, in accordance with the terms of said contract and the rules and regulations governing his membership. (4) That a copy of the regulations of said relief department is attached hereto, marked 'Exhibit B,' and made a part hereof. That the certificate of membership in said relief department was issued to said Edward Walters, upon an application made and executed by him in the form as prescribed by section 33 of the regulations, a copy of which application is hereto attached and made a part hereof, marked 'Exhibit C.' (5) That the plaintiff was on the 19th day of June, 1899, duly appointed administratrix of the estate of Edward Walters, deceased, and thereafter, to wit, on or about the 1st day of March, 1900, the plaintiff as such administratrix commenced an action in the district court of Greeley county, Neb., against the Chicago, Burlington & Quincy Railroad Company, to recover the sum of \$5,000 as damages sustained on account of the death of her said son, Edward Walters. That said cause was removed to the Circuit Court of the United States for the District of Nebraska, and was there tried on its merits. That on said trial it was pleaded and proved by the defendant that it was in no wise responsible or liable to the plaintiff in said action in damages by reason of the death of the said Edward Walters, and on the 24th day of October, 1900, judgment was duly rendered in said action in favor of the defendant therein and against the plaintiff therein, finally and conclusively determining and adjudicating that the said defendant was not responsible or liable in damages

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for the death of said Edward Walters, and that the plaintiff had no legal right to recover any damages whatever from defendant by reason of his death, and that the said defendant should go hence without day and recover of the plaintiff therein its costs expended in said cause. That an appeal was duly taken from said judgment by the plaintiff as administratrix of the estate of Edward Walters, deceased, to the Supreme Court of the United States, and on or about the 14th day of April, 1902, the judgment of the lower court was affirmed by the Supreme Court of the United States (22 Sup. Ct. 941, 46 L. Ed. 1266), and a judgment on mandate rendered in the Circuit Court of the United States for the District of Nebraska against the plaintiff for costs in said proceedings. That said judgment has never been vacated, set aside, canceled, or modified in any way, and still stands in full force and effect as a valid adjudication of a claim of plaintiff, as administratrix, in that proceeding to recover damages against the said railroad company. (6) No judgment for damages by reason of the death of said Edward Walters has been rendered in any action in said federal court, or any other court, against the defendant and in favor of the plaintiff. (7) That no demand was ever made by this plaintiff, or any one for her, for the payment of the death benefit provided in said contract of membership, until after the final adjudication of the said action brought by the administratrix of said estate for damages as above set forth, and no death benefit has ever been paid by the defendant company or its successor, on account of the death of said Edward Walters."

The clause in the regulations of the department mentioned as Exhibit B in the foregoing stipulation, and upon which the defendant relies, and which the lower court adjudged as in the circumstances of the case a sufficient defense, is as follows: "If any suit shall be brought against the company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited, without any declaration or other act by the relief department or the company. * * *" The ingenious argument of counsel for the plaintiff in error, succinctly stated, is this: It is a settled rule of law, established by the decisions of this and many other courts, that the doctrine of the election of remedies is inapplicable in an instance in which the facts alleged or the nature of the obligation asserted in the former and latter suits are not mutually inconsistent. Hence, it is argued, using the circumstances of the present litigation for an illustration, the plaintiff had a right to recover either from the railway company or from the relief department upon the facts which are agreed in the stipulation to have occurred, and the single additional fact of negligence alleged in the unsuccessful suit against the former is supplemental to, but in no respect or particular inconsistent with, all or any of such agreed facts, and the rule is invoked that in the absence of such

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inconsistence one is not barred of his real remedy merely because he has mistakenly sought the use of one to which he was not entitled or which the law did not give him. About these rules of law there is no dispute or doubt, but we think that the argument of counsel is fallacious and that they are inapplicable to this case. It is true, as has been held by this court in cases cited by counsel, that upon the happening of an accidental injury or death to a member, for which his certificate provides indemnity, he or his beneficiary has an election whether such indemnity shall be demanded from the relief department, or whether an action in tort shall be prosecuted against the railroad company, and for the purpose of determining whether such an election has been made, the rules of evidence relative to the general doctrine of the dark and dangerous, and there were no lights, and "the defendant, election of remedies are applicable. *C., B. & Q. R. R. Co. v. Bigley* (Neb.), 95 N. W. 344; *C., B. & Q. R. R. Co. v. Olson* (Neb.), 97 N. W. 831. But the consequences of an election in two classes of cases may be very different. It may be that if the contract sued upon had omitted any reference to such consequences the position of counsel would have been tenable; that is to say, if the railroad company and its relief department are substantially identical, and the certificate of membership had simply provided indemnity in case of the death of the deceased, it may be (we do not decide) that an unsuccessful action in tort would not have barred a subsequent suit on the contract, but in this instance the regulations which are a part of the contract expressly covenant that an action in tort shall operate as a bar. In the absence of the contract no suit would have been maintained against the relief department at all, and, of course, none can now be maintained against it, except such as the contract gives, and under such circumstances as it prescribes. The plaintiff was quite as much at liberty to choose whether she would sue the railway company or the relief department as she would have been in any other imaginable case; but the consequences of such choice are to be determined, not by the general rules of law, but by the terms of the contract by which the deceased had bound himself and her.

We recommend, therefore, that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

ILLINOIS CENT. R. CO. *et al.* v. HOUCHINS.

(Court of Appeals of Kentucky, Nov. 28, 1905.)

[89 S. W. Rep. 530.]

Removal of Causes—Joinder of Resident Defendants.—Where a petition for tort states a cause of action against a nonresident and a resident jointly, the state court has jurisdiction, and the nonresident is not entitled to a removal of the cause to the federal court, which is without jurisdiction.

Railroads—Torts—Persons Liable—Joint Liability.*—Where a railroad engineer is guilty of negligence which results in injury to a mail clerk, the engineer and the railroad company are jointly liable for the injury, and may be sued jointly or severally.

Damages—Personal Injuries—Evidence—Life Expectancy.—Where, in an action for injuries, there is proof that plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of his life is admissible on the issue of damages.

Evidence—Mortality Tables.†—The American Mortality Table is competent evidence to prove one's expectancy of life.

Damages—Instructions as to Effect.—Where, in an action for personal injuries, a mortality table is introduced in evidence to show plaintiff's life expectancy, the court should, if requested, instruct the jury that the table shows only the probable duration of life of healthy persons who are insurable risks, and not the duration of liability to earn money, and that it is to be considered with other proof for what it may be worth, considering plaintiff's state of health, in determining the probable duration of his capacity to earn money.

Evidence—Admission of Servant.‡—In an action against a railroad for injuries to a mail clerk, caused by the negligence of an engineer,

*See *Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233 (joinder of company and negligent conductor as defendants in action for injuries to brakeman); *Gardner v. Southern Ry. Co.* (S. Car.), 7 R. R. R. 958, 30 Am. & Eng. R. Cas., N. S., 958 (where, in an action for personal injuries, the complainant alleges that plaintiff was injured by the willful tort of the master and of a servant, it is error to charge that there must be a verdict for defendants if the jury find that the servant was not guilty of negligence); note appended to *Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.), 14 Am. & Eng. R. Cas., N. S., 827 (joinder of master and servant in action for tort of servant); foot-note appended to *Winston's Adm'r v. Illinois Cent. R. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 454; *Warax v. Cincinnati, N. O., etc., R. Co.*, 72 Fed. 637, 3 Am. & Eng. R. Cas., N. S., 650 (joining agent and principal as defendants in an action to recover damages for a negligent act of the agent, committed in the absence of the principal and without his direction, is a misjoinder; the causes of action being not joint, but several).

†For the authorities in this series on the subject of the admissibility of life tables in evidence, see foot-notes appended to *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795; foot-notes appended to *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 14 R. R. R. 602, 37 Am. & Eng. R. Cas., N. S., 602.

‡For the authorities in this series on the question whether the declarations of railroad employees are *res gestæ*, see foot-notes appended to *South Covington & C. St. Ry. Co. v. Reigler's Adm'r* (Ky.), 15 R. R. R. 256, 38 Am. & Eng. R. Cas., N. S., 256; foot-notes appended to *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

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an admission made by the engineer long after the accident is not part of the *res gestæ*, and is incompetent against the master.

Same—Admission of Party.—Admissions made by a railroad engineer, some time after an accident caused by his negligence, are admissible against him in an action against him and the railroad company for such negligence.

Trial—Instructions—Effect of Evidence.—Where an action for injuries caused by the negligence of a railroad engineer is brought against the engineer and the railroad jointly, and admissions of the engineer made long after the accident are introduced in evidence, the court should instruct the jury that such admissions may only be considered against the engineer and not against the railroad.

Same—Instructions.—The court should charge the jury that evidence introduced to discredit a witness is not to be considered as substantive testimony.

Damages—Punitive Damages—Instructions.—Where an instruction is given as to punitive damages, the court should clearly tell the jury that the giving of punitive damages is matter of discretion.

Same—Excessive Verdicts—Personal Injuries.—In an action for personal injuries, a verdict for \$10,500 was excessive, where the evidence was very uncertain as to the extent of plaintiff's injuries, or as to what his permanent condition would be, and, while a number of physicians testified that the plaintiff's spine was injured, and that he was lame, and permanently disabled from following his vocation as postal clerk, and to a large extent a nervous wreck, yet others testified that they had examined him carefully, but could find nothing wrong, and that he was a fine insurance risk and normal in every way."

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by J. E. Houchins against the Illinois Central Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Jonson & Wickliff, J. S. Wortham, J. M. Dickinson, and Trabue, Doolan & Cox, for appellants.

B. F. Proctor, G. H. Herdman, Greene & Van Winkle, and S. D. Hines, for appellee.

HOBSON, C. J. J. E. Houchins was a postal clerk on a mail train running between Paducah and Louisville on the Illinois Central Railroad. On November 7, 1902, at 11:36 a. m., the train on which Houchins was collided with an engine and tender in the yards at Central City. By reason of the collision Houchins was thrown against the end of the car. At first it was not thought that he was very much hurt, as there was no apparent injury of a serious character. He was taken to his home at Leitchfield and was confined to his bed about 20 days. After that he went about on crutches for a while, and then with a cane. Some time afterwards he undertook to go back to work on the road, and found that he could not stand the work on the train, and took a place in Louisville as transfer clerk, where he has since been employed, which pays him \$900 a year. His salary as postal clerk was \$1,000, and his living in Louisville is more expensive than at Leitchfield. There is a limp in his walk, but the proof is very conflicting as to the extent of his injuries. The

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trial occurred in January, 1904, or about 15 months after he was hurt. A number of physicians testified on the trial for the railroad company that they had examined him carefully and with the aid of the X-rays, but could find nothing wrong; that he was a fine insurance risk and normal in every way. On the other hand, a number of physicians testified for him that his spine was injured and that a lump had formed in his hip joint, causing lameness and permanently disabling him from following his vocation as postal clerk. According to the evidence for him he was to a large extent a nervous wreck, while according to the evidence for the railroad company he is a healthy man and in normal condition. The jury found a verdict in his behalf for \$10,500 against the railroad company and the engineer in charge of the engine with which the train collided, and the defendants appeal.

Williams, who had charge of the engine with which the train collided, had taken his engine off the side track and was going down the main track to get to his train, which was due to leave shortly. As he was going out on the main track his attention was called to the fact that the passenger train was about due, and he said that it was not due yet, that he had just looked at his time card, that the passenger train was due at 11:55, and that it was then only 11:35. He went out on the track, and just after he got on the track the passenger train came around the curve and ran into him. The fact was the passenger train was due at 11:35, and he had made a mistake in reading his time-card and had taken the leaving time of the passenger train, which was 11:55, for its arriving time, which was 11:35. Those in charge of the passenger train were in no way in fault for the collision. The train was on time, and the trouble was wholly due to Williams' making the mistake in the reading of his time card. The engineer of the train was killed, and the fireman was badly hurt, and so were several other persons. The railroad company filed its petition for a removal of the case to the Circuit Court of the United States, aptly alleging that Williams was fraudulently joined as a defendant for the purpose of preventing a removal of the case to the United States Circuit Court, and that the allegations of the plaintiff's petition were known to him to be untrue, and that he did not expect to prove them when he made them, and that they were made solely for the purpose of preventing a removal of the case to the United States Circuit Court. The court overruled the motion to remove the case, and the railroad company then filed an answer, in which it admitted that the collision was by reason of the ordinary negligence of Williams, the engineer in charge of the switch engine, and confessed to liability to Houchins in the sum of \$250.

It is insisted that the court erred in refusing to remove the case to the Circuit Court of the United States, on the idea that the company cannot be sued jointly with the servant whose negligence caused the injury where it was not independently at fault, that under the allegations of the petition for removal the rail-

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road company had a right to remove the case, and that the Circuit Court of the United States must determine the questions arising on the allegations of the petition for removal. We cannot accede to this view. The plaintiff's petition stated a cause of action within the jurisdiction of the state court. The joint cause of action so stated by him in his petition was not removable to the federal court under the act of Congress. That court had no jurisdiction over the case, and any order it made in a case of which it had no jurisdiction was void. Consent cannot confer jurisdiction, and if the railroad company had been beaten in that court it might at the end of the litigation have raised the question of jurisdiction. It was not contemplated by the act of Congress that every case, whether removable or not, should be subject to the control of the federal courts. If the course urged in this case is to be approved, then every case to which a nonresident is a party, although liable jointly with the others, may be removed to the federal court. The action was properly brought in the state court. That court admittedly had jurisdiction, and it certainly cannot be maintained that it should have surrendered jurisdiction over the case and sent it to a court for trial which on the face of the papers was without jurisdiction to make any order in it.

It is settled that under the law of Kentucky Williams and the railroad were jointly liable to Houchins for his injury, and might be sued jointly or severally. *C. & O. R. R. Co. v. Dixon*, 104 Ky. 608, 47 S. W. 615; *Cincinnati, etc., R. R. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383; *I. C. R. R. Co. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. —. Is this action, which confessedly lies in the state court under laws of the state, to be controlled by the federal court, and may that court, if of opinion that a joint action does not lie, take jurisdiction of the case? Such a rule would deprive the litigant of his right to try his case under the laws of the state, and would compel him to get into the merits of his case before a tribunal without jurisdiction to sit in it. If the state court makes a mistake, an appeal may be taken to this court; and if the railroad company feels aggrieved by the decision of this court it may in every case prosecute an appeal to the Supreme Court of the United States on the question. So it is not without remedy, and there is no possibility of its rights not being properly protected.

Houchins proved on the trial that he was 29 years of age at the time of the injury. He introduced on his behalf W. T. Morgan, who, over the objections of the defendants, was allowed to testify as follows: "Q. According to the American Tables of Mortality, what is the probable expectation of the life of a man 29 years of age? A. This is a book of the Mutual Life Insurance Company of New York. Take a man at the age of 29, the probable expectancy of life for him would be 36.2 years; a man in good health and 29 years old, his expectation of life would be 36.2 years. Q. That is the American Table of Mortality? A. Yes, sir. Q. This book is gotten out by the Mutual Life Insur-

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ance Company of New York? A. Yes, sir; that book was sent me this year." According to Dr. Wigglesworth's Table, which has been adopted by this court, the expectancy of life of a man at 29 years old is 30.66 years. The evidence objected to showed that the expectancy of life at 29 years was nearly 6 years longer. When the action is to recover for the death of a person injured, as the measure of recovery is the value of his capacity to earn money, standard tables, showing the ordinary expectancy of life, are held to be competent. Where, as in this case, there is proof tending to show that the plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of life is equally competent; for the measure of recovery here is in part compensation for the impairment of his capacity to earn money. If, as is conceded, evidence of the ordinary expectation of life may be received where the capacity to earn money is destroyed by death, it is hard to see why such evidence cannot be equally received where the capacity to earn money is partially destroyed; for in either case the jury are, in making up their verdict, to be governed by the capacity to earn money which has been destroyed, and whether this is a partial or total destruction is not material. *Greer v. L. & N. R. R. Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345.

The Carlisle Mortality Tables are based upon actual observation in the town of Northampton and Carlisle, England. The deaths were taken, not from selected lives, but from the population generally. These tables have been very generally admitted by the courts of this country. *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; 17 Am. & Eng. Ency. of Law, 900. The field, however, was so narrow that they have never been regarded as satisfactory. It is a matter of common knowledge that the expectancy of life is increasing. The American Table of Mortality has been made out from the combined experience of the life insurance companies of America, and is now regarded as the standard throughout the United States. It is true that it is based on insurable lives or healthy persons. Still, there is no great difference between it and the Carlisle Table, as by the Carlisle Table the expectancy of life of a person 29 years old is 35 years. In cases of this character the aim of the court is to get the best information attainable. The American Tables of Mortality have been recognized by many of the courts of the country as perhaps the best means of arriving at the expectancy of life. The Wigglesworth Tables were made before 1858. Since then there has been great advance in medical science, and the data upon which such tables are calculated are much fuller now than then. The court, as information increases, will use that table which is the best and most reliable. The American Mortality Table was held competent in the case of *Greer v. L. & N. R. R. Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345, and this case was followed in *L. & N. R. R. Co. v. Gordan* (Ky.), 72 S. W. 311. After maturely reconsidering the subject we have reached the conclusion to follow the rule heretofore laid down, and to

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hold that in each case the expectancy of life may be shown, as any other fact, by the best evidence obtainable, and that, as improved tables come into use which are of standard authority, they may be given in evidence, instead of the older tables which they supersede.

Such tables show only the probable continuance of life, and not the duration of ability to earn money. They show the probable duration of life of healthy persons who are insurable risks, and the court, when requested, should tell the jury what the table shows, and that it is to be considered by them, in connection with the other proof in the case, for what it may be worth, considering the plaintiff's state of health and circumstances, in determining the probable duration of his capacity to earn money. 3 Wigram on Evidence, § 1698; *Gordon v. Tweedy*, 49 Am. Rep. 813.

The court allowed the plaintiff to prove by a witness that Williams, long after the accident, acknowledged to backing his engine out on the main track on the time of the train, saying he forgot the dead time the train had there. This was no part of the *res gestæ*, and the admission by the servant was incompetent against the master. *C. & O. R. R. Co. v. Smith*, 101 Ky. 111, 39 S. W. 832. The evidence was, however, competent against Williams, and not against the other defendant. *Cincinnati, etc.*, when it was admitted by the court without any admonition, the jury would understand it to be competent against all the defendants. In admitting the evidence the court should have cautioned the jury that it could only be considered against the defendant Williams, and not against the other defendant. *Cincinnati, etc.*, *R. R. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383. It often happens, in suits against two defendants, that evidence of admissions is competent against the one who made them and not competent against his codefendant; yet it is everyday practice to admit it, with proper admonition to the jury as to the defendant against whom it may be considered. There is nothing in this class of cases to except it out of the general rule, but it is a serious error for the court to admit the evidence without cautioning the jury as to the person against whom it may be considered. *I. C. R. R. Co. v. Winslow*, 84 S. W. 1175, 27 Ky. Law Rep. 329. The statement was made in a deposition. The writing is the best evidence. If proper foundation was laid, the statement might be used to discredit Williams as a witness; but the court should tell the jury it is not in this event to be considered as substantive testimony.

On the question of damages the court, after directing the jury to find compensatory damages, added these words to the instruction: "If the jury believe from the evidence that the said collision was caused by the gross negligence of the defendant railroad company's agents or servants in charge of the engine with which passenger train collided on the occasion in controversy, then and in that event the jury may, in addition to compensatory damages, if any, award the plaintiff punitive damages against said de-

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fendant Illinois Central Railroad Company, not exceeding, however, in the aggregate \$15,000, the amount claimed." As to whether there was enough in the evidence to warrant the awarding of punitive damages the court is equally divided. But when an instruction is given as to punitive damages the court should clearly tell the jury that the giving of punitive damages is a matter of discretion, and in this case the court should tell the jury that if they believe, from the evidence, that the collision was caused by the gross negligence of the railroad company or its servants in charge of the engine, then, in addition to compensatory damages, if any, the jury may or may not, in its discretion, award the plaintiff punitive damages in such sum as, under all the evidence, they deem right, not exceeding, however, \$15,000, the amount claimed in the petition. On another trial the first and second instructions will be combined in one instruction, as this will simplify the matter somewhat for the jury.

It is earnestly insisted that the verdict of the jury is palpably excessive, the result of passion and prejudice. In view of the uncertainty of the evidence as to the extent of the plaintiff's injuries, or as to what his condition will permanently be, we are of opinion that the verdict is excessive, and that, on the whole case, a new trial should be awarded.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

CHICAGO UNION TRACTION CO. v. SAWUSCH.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 797.]

Master and Servant—Injuries to Servant—Defective Appliances.*—A street railway company is liable for an injury to a servant because of the negligence of another servant in delivering a car without a motor handle, or with a handle which does not fit the car and with which the car cannot be reversed.

Same—Fellow Servant—Vice Principal.†—If an injury to a servant is caused in part by the negligence of a fellow servant, yet the negligence of the vice principal contributed to the injury, the master is liable.

*For the authorities in this series on the question, what are the duties of a railroad company which it cannot delegate, so as to escape liability for injuries to its employees, under the fellow-servant rule, see foot-notes appended to *Richey v. Southern Ry. Co. (S. Car.)*, 14 R. R. R. 526, 37 Am. & Eng. R. Cas., N. S., 526; foot-notes appended to *Philadelphia, etc., R. Co. v. Devers (Md.)*, 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366.

For the authorities in this series showing who are vice principals, or superior servants, whose negligence other employees do not assume under the fellow-servant rule, see foot-notes appended to *Struble v. Burlington, etc., Ry. Co. (Iowa)*, 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259.

†See foot-note appended to *Gila Valley, etc., Ry. Co. v. Lyon*

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Trial—Instructions.—Where instructions given for defendant sufficiently cover an instruction asked by it and refused, the refusal is not cause for reversal.

Appeal from Appellate Court, First District.

Action by Adolph Sawusch against the Chicago Union Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Rehearing denied December 6, 1905.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant.

Pinckney, Tatge & Abbott and Thomas A. Leach, for appellee.

BOGGS, J. In an action on the case by the appellee against the appellant company, judgment was entered in the superior court of Cook county in favor of the appellee in the sum of \$12,000, which, on appeal, was affirmed by the Appellate Court for the First district in the sum of \$10,000, a remittitur of \$2,000 having been entered, and a further appeal has brought the record into this court. Two grounds for reversal are urged: First, that the trial court erred in refusing to direct a peremptory verdict, as requested by the appellant company; and, second, that the court erred in refusing to give instruction No. 1 asked by the appellant company.

The contention of the appellant company as to the facts proven by the testimony is stated by its counsel as follows: "The evidence in this case is practically harmonious, and shows the following undisputed facts: The accident occurred July 3, 1901, about 11 o'clock at night, on Van Buren street between State street and Plymouth Place. The defendant has a double street car track in that part of Van Buren street, together with a switch track connecting the two main tracks. There are two lines of cars running on that street, the Van Buren street cars, which run east and west on Van Buren street from State street to Kedzie avenue, and the Twelfth street cars, which run east and west on Van Buren street from State street to Fifth avenue and then turn off into another street. Both these lines are operated by means of an overhead trolley. At the time of the accident the plaintiff was a conductor running on the Van Buren street line, and had been running on that line for about five years. The cars are trolley cars, capable of running in either direction and with a fender at each end, the fender at the rear of the car being usually fastened up and the one in the front of the car extended while the car is running. Of course, when the car changes from one direction to the other it is necessary to put down one fender and raise the other. At the time of the accident the plaintiff's

(Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745; foot-notes appended to *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795; foot-notes appended to *Conine v. Olympia Logging Co.* (Wash.), 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387.

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car, which was east-bound, had nearly reached the terminus of its run, and was about to switch over into the other track on its return trip. It was standing still at the time, on the east end of the southerly track, the motorman being still at the east end of the car. The plaintiff reversed the seats in the car preparatory to the return trip, and then got off and went to the rear of the car in order to let down the fender at that end, which had been fastened up while the car was going east. This, he says, was his duty. When he reached that point he found that a Twelfth street car, which had also just come in from the west, was so close to his car that he could not lower the fender. He therefore asked the motorman of the Twelfth street car, with whom he was acquainted, having met him at that point nearly every evening, to move his car back. The motorman promised to do this, but in attempting to turn the handle so as to reverse the power he unintentionally made the car go forward instead of backward, with the result that the plaintiff's leg was caught between the two cars.

The cause of the unexpected motion of the Twelfth street car was this: On the defendant's lines there are in use trolley cars having two different sizes of motors, and these different motors have different kinds of handles. These handles are removable, and whenever these cars are in the barns the handles are taken off and put in a place by themselves, ready to be used again when occasion requires. The motor on the Twelfth street car in question was a small motor, and the handle which the motorman was using was one adapted to the large motor. With such a handle it was possible apparently to make the car go forward and also to stop it, but if the attempt was made to reverse the car the handle was liable to slip, so as to cause the car to go forward instead of backward, and that is what happened on this occasion. The cause of the motorman's having the wrong handle on this occasion is thus explained: He had been running another car that day, but something went wrong with his car and his conductor telephoned to the car barns for another car. The other car was sent out to him in charge of a man employed in the barns, and when the two cars met at a point about a mile from the barns, the barn man took the disabled car on to the barns and the motorman proceeded on his way back with the new car. The car which he had been operating had a large motor while the car in which he now found himself had a small motor, and it is clear that in transferring from the one car to the other he carried his motor handle with him, instead of leaving it in the car and taking the motor handle which had been used in the other car. This matter is sworn to directly by one witness, the conductor on this car in question, who said they 'changed the handle,' and it clearly appears by necessary inference from the evidence in the record. Thus Anderson, the barn man, swore that when he took the car in question out of the barns that night he had a motor handle that fitted the motor in that car. He turned that car over to this motorman, and yet it clearly appears that at the time of the

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accident the motorman on the Twelfth street car had a handle which did not fit the motor on his car. The only possible explanation of this phenomenon is, that in the hurry of changing cars the motorman kept and transferred the motor handle which he had been before using, instead of leaving the motor handle on the car which it fitted. Both Anderson (the barn man) and Hunt (the motorman) say that they do not remember whether they changed handles at the time when they changed cars or not. The motorman did not discover that he had the wrong handle until the accident happened. The motor itself, the handles, car, and other apparatus were all right, in good repair."

The contention that Hunt, the motorman, and the appellee were fellow servants may be conceded. Anderson, the barn man, was clearly not a fellow servant of the appellee. He had no duty to perform which had any connection with the duties of the appellee. The car which the motorman, Hunt, had been operating proved to be out of repair, and in order to enable Hunt to perform the work of the master the latter undertook to send him another car. Anderson, the barn man, was chosen by the master to select the car to be sent to Hunt and to take it out on the line of the road and there deliver it to Hunt. Anderson was therefore, while engaged for the master in supplying to Hunt a car, performing a duty which devolved on the master to perform. It was the duty of the appellant company to furnish the cars to be operated by its servants. The law charged upon it the positive obligation to furnish reasonably safe cars and with no necessary part omitted therefrom, and holds it responsible for any failure to discharge that obligation and makes it liable for the failure of any servant it may employ to discharge that obligation. Any servant so employed is engaged in the performance of a duty or obligation of the appellant company and is acting as the representative and agent of the appellant company, and for any want of proper caution on the part of any such agent or representative the appellant company is liable as for its own personal negligence. The neglect to properly perform that duty by such a representative or agent of the master is not a peril which other servants of the master assume. *Chicago & Alton Railroad Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396.

We think it clearly deducible from the proof, either that Anderson, the barn man and the representative of the appellant company, delivered to Hunt the car which he (Anderson) brought from the barn with the improper handle thereon which was on that car when appellee was injured, or that Anderson delivered that car to Hunt without any handle on it. Anderson returned the defective car to the barn, and Hunt ran the car which came to him from the barn on his trip on appellant's tracks on the street, and both of the cars must have had motor handles after the change was made. If the handle remained on each car when the cars were changed, then Anderson, the representative of the appellant company, delivered to Hunt a car supplied with an improper handle, and this negligence was that of the appellant

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company and was the cause of the injury to the appellee. If, when the cars were changed, each motorman carried with him the handle from the car he was operating, then Anderson delivered to Hunt a car without any handle, which was a negligent act on the part of the appellant company and the proximate cause of the injury to appellee. We think it very clear that each motorman, when the cars were changed, carried away with him the handle he was using, and hence that each man got a car without a handle. If Hunt carried the handle which was on the defective car to the car which Anderson delivered to him and Anderson had not taken the handle therefrom, Hunt would have had two handles and the car which he delivered to Anderson would have been without any handle, and Anderson could not have run it back to the barn, as he did. Anderson, however, ran that car which he got from Hunt, back to the car barn, and it follows either that Hunt did not carry the handle from that car and Anderson used the handle he found upon it, or that Anderson carried the handle from the car he had brought from the barn and used that handle, and consequently delivered the other car to Hunt unprovided with any handle.

These conclusions do not result from mere conjecture or speculation as to what may have occurred, but are logically and reasonably to be deduced from the existence of facts that are established by the proofs. It may be that it is fairly to be deduced also from the evidence that Hunt, the motorman, if he had exercised due care, would have discovered that the car which was delivered to him by Anderson, the barn man, was operated by a different and smaller motor requiring a different and smaller handle than the car he had been operating, and the injury received by the appellee may have been, in part, chargeable to this lack of due care on the part of Hunt, a fellow servant. But if the negligence of Anderson, who was the representative of the appellant company and whose negligence was its negligence, contributed to the injury, and the injury would not have occurred but for the lack of care of Anderson, the appellant company would be liable. *Chicago & Northwestern Railway Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037. The trial court did not, therefore err in refusing to direct a verdict as a matter of law.

By instruction No. 1, asked by the appellant company and refused, the court was requested to direct the jury that the motorman, Hunt, and the appellee, were fellow servants, and that the appellee could not recover under the first count of the declaration even if the jury should believe that Hunt was guilty of negligence in the manner in which he operated the car at the time and place when and where the appellee was injured. The first count in the declaration charged that "defendant, by its said servants, so carelessly, negligently, and improperly drove and managed the said motor or trolley car, that by and through such carelessness, negligence and improper driving of said motor or trolley car said car then and there ran and struck with force and violence upon

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and against the plaintiff." No instructions were asked in behalf of the appellee. Twenty-four instructions were asked in behalf of the appellant company. In these instructions the relation of fellow servants, what constituted the relation, and when it existed, were fully made known to the jury in language selected by counsel for the appellant company, and the question whether that relation existed between the motorman, Hunt, and the appellee, was fully and fairly submitted to the jury, to be determined from the testimony under concededly correct instructions of the court; and the jury were expressly instructed in instruction No. 5, that if they believed, from the evidence, "under the instructions of the court, that the plaintiff and the servant or servants in control of and operating such car, at the time and place in question, were fellow servants as defined in these instructions, then the plaintiff cannot recover under the first count of his declaration." This instruction, under the conceded facts of the case, secured to the appellant company all benefit that could have resulted from instruction No. 1 had it been given.

The verdict is entirely consistent with the view that the jury concluded that Hunt and the appellee were fellow servants, and followed the direction of the court given in instruction No. 5, but found, from the evidence, that the appellant company furnished to such fellow servant an improper, unsafe and defective motor or trolley car, and that the injury was occasioned by such failure of the appellant company to discharge its duty as master, as charged in the second count of the declaration.

We think there is no error in the record reversible in character. The judgment is affirmed.

Judgment affirmed.

WEISSER v. SOUTHERN PAC. RY. CO.

(Supreme Court of California, Jan. 15, 1906.)

[83 Pac. Rep. 439.]

Appeal—Record—Order Granting New Trial.—A copy of a letter written by the judge to appellant's counsel, stating the grounds upon which he granted the new trial, which grounds were not shown in the order for new trial, constituted no part of the record on appeal.

New Trial—Order—Statement of Grounds.—A general order granting a new trial entered on the minutes of the court cannot be limited by an independent writing stating the grounds on which the new trial is granted.

Appeal—Review—Grounds of Order for New Trial.—Though an order for new trial specifies the grounds upon which it was granted, the action of the court in stating such grounds cannot restrict the Supreme Court to the grounds so specified for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of conflicting evidence.

Same—Review of Discretion—Granting New Trial.—Though there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on the ground of the insufficiency of the evidence whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be dis-

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turbed on appeal, unless it is apparent that there has been an abuse of discretion.

Master and Servant—Fellow Servants—Persons Serving Apprenticeship.*—A student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other trainmen, although he was receiving no pecuniary compensation.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Lawrence Weisser against the Southern Pacific Railway Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

S. V. Landt and *M. E. C. Munday*, for appellant.

Bicknell, Gibson & Trask, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant while he was engaged in the service of said defendant. The jury impaneled to try the cause rendered a verdict in favor of plaintiff for \$9,000, and judgment was entered accordingly. Defendant regularly made a motion for new trial on practically all the grounds authorized by statute, including that of insufficiency of the evidence to justify the verdict, and in its statement on motion for new trial specified with great particularity the particulars wherein it was claimed that the evidence was insufficient. The trial court disposed of such motion by making a general order granting the same, the minute order being as follows, viz.: "Defendant's motion for new trial ordered to be and the same is hereby granted." Plaintiff appeals from such order granting defendant's motion for new trial.

It is suggested by plaintiff that the order of the trial court was based upon two grounds only, viz., error in admitting certain evidence, and insufficiency of the evidence to sustain a conclusion that the plaintiff was not guilty of contributory negligence, and that this court is limited to a consideration of these questions upon this appeal. In support of his claim that the order was made for these reasons alone, he sets forth in his brief a copy of a letter written to his counsel by the judge of the trial court, some months after the granting of the new trial. This letter, of course, constitutes no part of the record on appeal, and could not be made a part thereof. *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830. Even if the same had been written and filed at the time of the granting of the new trial, it could not have operated to limit the effect of the general order entered on the minutes of the court, which order so entered is, under the decisions, the only

*For the authorities in this series on the question who are, and are not, the employees of a railroad company, see foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

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record of the court's action. Any limitation, to be effectual, must be specified in the order. *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 621, 75 Pac. 332; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110. Furthermore, even if the trial court in this case had effectually specified in its order the grounds upon which it granted the new trial, its action in this regard could not have restricted this court to the grounds so specified in its examination of the record, for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of the evidence where it was conflicting. *Thompson v. Cal., etc., Co. (Cal. Sup.)* 82 Pac. 367; *Kauffman v. Maier*, 94 Cal. 269, 276, 29 Pac. 481, 18 L. R. A. 124. As it is admitted that one of the grounds upon which the trial court based its action in granting a new trial was that the evidence was insufficient to sustain a conclusion that plaintiff was not guilty of contributory negligence, what has been said herein as to the questions reviewable upon this appeal is unnecessary for the purposes of the decision, and has only been said in view of the apparent misconception of the rules applicable in such matters.

Upon the question as to whether plaintiff was guilty of contributory negligence, there was apparently some conflict in the testimony. This, however, was not sufficient to prevent the trial court from granting a new trial, on the ground of the insufficiency of the evidence. It is established by numerous decisions in this court that, although there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on such ground, whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed, unless it is apparent that there has been an abuse of the discretion confided to him. See *Green v. Soule*, 145 Cal. 96, 102, 78 Pac. 337; *Bates v. Howard*, 105 Cal. 173, 178, 38 Pac. 715; *Mock v. L. A. Trac. Co.*, 139 Cal. 616, 73 Pac. 455; *Bjorman v. Fort Bragg R. Co.*, 92 Cal. 500, 28 Pac. 591. The record on this appeal affords no basis for any claim that there was any such abuse of discretion in this case. It is therefore manifest that regardless of other reasons that may exist, the order granting a new trial must be affirmed. While it is unnecessary, for the purposes of a decision of this appeal, to consider any of the other points made in support of the order, the question as to whether plaintiff was a "fellow servant" of the employees of defendant on the train upon which he was engaged and by which he was injured, and therefore not entitled to recover from defendant if the injuries were wholly caused by the negligence of any such employee in the operation of the train (section 1970, Civ. Code), has been discussed by counsel, and its determination may be necessary for the purposes of a new trial. From the evidence of plaintiff it appears that, at the time of the accident, and for some time prior thereto, he was acting as a "student brakeman" on freight trains of defendant, at his own request and by permission of defendant, for the purpose of gaining such experience and knowledge of the work on defendant's

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road as would, in the opinion of the defendant, render him fit and competent to act as a regular brakeman thereon, and to receive for his work a regular brakeman's pay. As such "student brakeman" he was entirely subject to the orders of defendant, and was required to perform such ordinary duties of brakeman as were allotted to him, just as fully as if he had been assigned regular employment for a pecuniary compensation by defendant. It is difficult to conceive of any reason why one, situated as these circumstances show plaintiff to have been, should be held to be other than an employee of the defendant, subject to all the obligations imposed by that relation. He was certainly in the service of defendant, regularly engaged in the doing of the defendant's business. The simple fact that he was not to be paid any money for his services cannot affect the question. It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration. The important thing is that he voluntarily entered and was engaged in the service of the defendant upon such terms as he had seen fit to agree to. While so engaged in such service, there was no distinction, material to the question under discussion, between his situation and that of the other employees on the train. They were all regularly engaged in the service of defendant, in the common employment of operating a train for defendant. In other words, they were fellow servants. Plaintiff had the same right as the other employees to be indemnified for all injuries caused by the defendant's negligence, but his rights in this regard were no greater than those of the other employees, and, as in the case of such other employees, the defendant could not be held liable to him for injuries caused solely by the negligence of his fellow employees in the same general business, except in the cases specified in section 1970, Civ. Code. No case has been cited by plaintiff on this point which is contrary to the views here expressed. On the other hand, the case of *Millsaps v. Louisville, etc., Ry. Co.*, 69 Miss. 423, 13 South. 696, is squarely in point. There, one working as fireman on defendant's engine, with the permission of the defendant, for the purposes of learning the business, was killed in a collision caused by the negligence of a paid employee claimed to be a fellow servant. The Supreme Court held, under these facts, that plaintiff's intestate was the servant of the defendant and the fellow servant of the other employee, and that, consequently, no recovery could be had. The case of *Barstow v. Old Colony Railroad Co.*, 143 Mass. 535, 10 N. E. 255, is also in point. See, also, *Ladd v. Brockton St. Ry. Co.* (Mass.) 62 N. E. 730; *Wischan v. Richards* (Pa.) 20 Atl. 532, 10 L. R. A. 97, 20 Am. St. Rep. 900.

Under our views of the law upon this proposition, the trial court erred in the matter of instructions to the jury thereon, and this also is a sufficient reason for affirming the order granting a new trial. We do not consider it necessary, for the purposes of a new trial, to consider any of the other questions discussed.

The order granting a new trial is affirmed.

We concur: SHAW, J.; MCFARLAND, J.

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Care due from trainmen to persons on railroad tracks, certain instructions were erroneously refused, since they correctly stated the law on the facts hypothesized. *Alabama Great Southern R. Co. v. Guest* (Ala.), 759.

Conductor was not negligent in not immediately giving signals to stop train, he not having himself discovered the nature of an object on track, which brakeman told him looked like a man. *Louisville, etc., R. Co. v. Hathaway's ex'x* (Ky.), 749.

Contributory Negligence.

Decedent's precluded recovery, in the absence of proof that defendant could, by ordinary prudence have avoided the injury after discovering his peril. *Barry v. Kansas City, etc., Ry. Co.* (Ark.), 735.

In action for death of section foreman, testimony that before he was struck he gave a command to hurry up certain work, and stated that the train was coming, did not show that he had heard or seen the train, and was aware of its immediate approach. *International & G. N. Ry. Co. v. McVey* (Tex.), 505.

Person struck by loose car while crossing tracks in switch yard was guilty of contributory negligence as matter of law. *Colorado & S. Ry. Co. v. Sonne* (Colo.), 727.

Where there was evidence that decedent was guilty of contributory negligence, and no proof that the company had discovered his peril, but only that by the use of ordinary care it might have discovered the peril in time to have avoided the accident,

ACCIDENTS ON TRACK.—Continued.

the company was not liable. *Barry v. Kansas City, etc., Ry. Co.* (Ark.), 735.

Evidence.

Distance within which train may be stopped. *Davis v. Seaboard Air Line Ry. (N. Car.)*, 163.

In action for the death of one run over by train, it was competent to show the condition as to the frequency and number of persons passing along defendant's track at the time and place in question. *Alabama Great Southern R. Co. v. Guest (Ala.)*, 759.

Where, in action for death of one run over by a train, defendant, by the introduction of certain evidence, tendered an issue of suicide, it was competent for plaintiff to offer evidence in rebuttal. *Alabama Great Southern R. Co. v. Guest (Ala.)*, 759.

Flagman killed while walking on track, outside his master's switching yard, error to refuse to charge that railroad's failure to take statutory precautions in running train was negligence. *Louisville & N. R. Co. v. Martin (Tenn.)*, 413.

Instruction that certain facts hypothesized showed such reckless indifference as would render defendant liable for the injuries, and plaintiff was entitled to a verdict if deceased was so killed, "notwithstanding there was no fault on the part of the servants of defendant" and notwithstanding that deceased was negligent, though it might have had a misleading tendency, was not reversible error, as the quoted phrase evidently referred to the conduct of the servants after the discovery of the peril of deceased. *Alabama Great Southern R. Co. v. Guest (Ala.)*, 759.

It was proper to refuse requested instruction, that jury could not find for plaintiff on a certain count unless they were satisfied that the cars were being run at a high and dangerous rate of speed when deceased was struck. *Alabama Great Southern R. Co. v. Guest (Ala.)*, 759.

Ordinance limiting speed of trains was for the protection of a railroad flagman, killed while walking on track, as well as the public. *Louisville & N. R. Co. v. Martin (Tenn.)*, 413.

Presumption that engine which struck plaintiff on defendant's track was operated by defendant or under its control, rendering it liable, is not overcome by evidence merely that it belonged to another company and was moved by its servants. *Gulf C. & S. F. Ry. Co. v. Miller (Tex.)*, 188.

Where, in an action for alleged willful and reckless killing of pedestrian walking on defendant's track, the admitted facts and all legitimate inferences which might be drawn therefrom in favor of plaintiff did not tend to establish his right to recover, it was proper to direct verdict for defendant. *Bartlett v. Wabash R. Co. (Ill.)*, 757.

Where the operatives of a train saw a man lying beside track, they were not negligent in failing to stop the train in anticipation that he would place his arm upon the rail before the train reached him. *Louisville, etc., R. Co. v. Hathaway's ex'x (Ky.)*, 749.

ACCOUNT BOOKS.

See **TAXATION.**

ACTION FOR DEATH OF PARENT.

See **DEATH BY WRONGFUL ACT.**

ACTIONS.

See **DAMAGES; DEATH BY WRONGFUL ACT; COMMON CARRIERS.**

Under Code, § 267, husband and wife cannot join their separate actions for damages for mental anguish caused by defendant's negligence and recover one sum in satisfaction of their several claims. *Eller v. Carolina & W. Ry. Co. (N. Car.)*, 609.

ACT OF GOD.

See COMMON CARRIERS.

ADDITIONAL SERVITUDE.

See RIGHT OF WAY.

ADJOINING PROPERTY.

See EMINENT DOMAIN; NUISANCES.

ADMISSIONS.

See LEASES AND RUNNING POWERS; PLEADING; TRESPASSERS.

ADMISSION BY NEGLIGENT EMPLOYEE.

See EVIDENCE.

ADMITTED BY STRANGER.

See STATIONS AT DEPOTS.

ADVERSE POSSESSION.

See RIGHT OF WAY.

AFFIRMATIVE MATTER IN AVOIDANCE.

See CARRIERS OF PASSENGERS.

AGENCY.

See CONNECTING CARRIERS.

Detective employed by railroad, and on whose information alone a warrant for plaintiff's arrest was sworn out by defendant railroad, is to be regarded as the agent of defendant in instigating the prosecution. *Evans v. Atlantic Coast Line Ry. (Va.)*, 624.

Railroad company was not liable for false imprisonment resulting from an arrest participated in by one of the employees of a detective agency, which the railroad had directed to find out who had committed a certain robbery; such arrest not having been within the scope of authority conferred on such agency. *Milton v. Missouri Pac. Ry. Co. (Mo.)*, 653.

AGREED VALUATION.

See COMMON CARRIERS.

AIR BRAKES.

See MASTER AND SERVANT.

ALIGHTING FROM MOVING CARS.

See CARRIERS OF PASSENGERS.

ALIGHTING ON WRONG SIDE OF TRAIN.

See CARRIERS OF PASSENGERS.

AMENDMENTS.

See DEATH BY WRONGFUL ACT; NEGLIGENCE.

AMERICAN MORTALITY TABLE.

See PERSONAL INJURIES.

ANIMALS.

See CARRIERS OF LIVE STOCK; STOCK, INJURIES TO.

ANNOYANCE.

See EMINENT DOMAIN.

ANOTHER COMPANY'S NEGLIGENCE.

See LEASES AND RUNNING POWERS.

ANTICIPATION OF DANGER.

See MASTER AND SERVANT.

ANTI-TRUST LAWS.

See MONOPOLIES.

APPEALS.

See NEGLIGENCE; TRESPASSERS.

APPLIANCE OF PARTICULAR KIND.

See MASTER AND SERVANT.

APPLIANCES.

See FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

APPLICATION OF CONSTITUTIONAL PROVISION.

See LOGGING RAILROADS.

APPLICATION OF ORDINANCE.

See ACCIDENTS ON TRACK; TRESPASSERS.

APPLICATION OF REGULATION OF CORPORATION COMMISSION.

See COMMON CARRIERS.

APPLICATION OF RULE.

See CARRIERS OF PASSENGERS.

APPLICATION OF STATUTES.

See ACCIDENT ON TRACK; ATTACHMENT; CARRIERS OF LIVE STOCK; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; EXPRESS COMPANIES; MASTER AND SERVANT; MONOPOLIES; TAXATION.

APPLICATIONS FOR JUDGMENT OF SALE.

See TAXATION.

APPRENTICESHIP.

See FELLOW SERVANTS.

ARGUMENTATIVE INSTRUCTION.

See NEGLIGENCE.

ARGUMENTS TO JURY.

See TRIAL.

ARRESTS.

See AGENCY.

ASSAULTS.

See TRESPASSERS.

ASSENT TO CONTRACT.

See COMMON CARRIERS.

ASSENT TO PRINTED CONDITIONS.

See TICKETS AND FARES.

ASSESSMENT.

See TAXATION.

ASSOCIATE LINES.

See CONNECTING CARRIERS.

ASSUMPTION AS TO PERFORMANCE OF DUTIES.

See CARRIERS OF LIVE STOCK.

ASSUMPTION OF RISK.

See CONTRIBUTORY NEGLIGENCE; CROSSINGS; MASTER AND SERVANT.

ASSUMPTION THAT CARRIER HAS PERFORMED ITS DUTIES.

See CARRIERS OF PASSENGERS.

ASSUMPTION THAT DUTIES HAVE BEEN PERFORMED.

See LICENSEES.

ASSUMPTION THAT PERSON ON OR NEAR TRACKS WILL AVOID DANGER.

See CARRIERS OF PASSENGERS.

ASSUMPTION THAT PERSON WILL AVOID DANGER.

See CARRIERS OF PASSENGERS; CROSSINGS; TRESPASSERS.

ATTACHMENT.

See GARNISHMENT; LEASES AND RUNNING POWERS.

Car standing on side track in Vermont cannot be reached by trustee process against railroad issued by a court in Massachusetts. *Cox v. Central Vermont R. Co. (Mass.)*, 432.

Rev. Laws, c. 167, § 39, applies to an attachment of cars and engines by trustee process. *Cox v. Central Vermont R. Co. (Mass.)*, 432.

ATTACKING VALIDITY OF INCORPORATION.

See EMINENT DOMAIN.

ATTORNEY'S FEES.

See COMMON CARRIERS.

ATTRACTING CHILDREN TO DANGEROUS PREMISES.

See CHILDREN.

AUTHORITY TO EJECT TRESPASSERS.

See TRESPASSERS.

AVOIDING DANGER.

See CONTRIBUTORY NEGLIGENCE.

AVOIDING IMMINENT PERIL.

See MASTER AND SERVANT.

BACKING CARS WITHOUT WARNING.

See MASTER AND SERVANT.

BAGGAGE.**Damages.**

Mental anguish of prospective groom caused by injury to trousseau of his bride to be, was too remote a form of damage to entitle groom to recover therefor against railroad, which did not know of the intended marriage. *Eller v. Carolina & W. Ry. Co. (N. Car.)*, 609.

Prima facie case made out by production of check and proof that baggage has not been delivered. *Zeigler Bros. v. Mobile & O. R. Co. (Miss.)*, 615.

Reasonable time and opportunity for passengers to call for their baggage after its arrival is a question for jury, dependent upon

BAGGAGE.—Continued.

circumstances of particular case. *Zeigler Bros. v. Mobile & O. R. Co.* (Miss.), 615.

Termination of carrier's liability after baggage has reached its destination, under Miss. Code 1892, §§ 3568, 3569. *Zeigler Bros. v. Mobile & O. R. Co.* (Miss.), 615.

Where plaintiff brought action against railroad for damage to her baggage, which contained bridal trousseau, and recovered judgment therefor, she could not thereafter maintain a separate action for mental anguish caused by the injury to her trousseau, but she should have collected all damage to which she was entitled in her original suit. *Eller v. Carolina & W. Ry. Co.* (N. Car.), 609.

BAILEES.

See CARRIERS OF LIVE STOCK.

BEGINNING OF LIABILITY.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS.

BENEFITS.

See EMINENT DOMAIN.

BIAS.

See WITNESSES.

BICYCLES.

See STREET RAILWAYS.

BLASTING.

See EMINENT DOMAIN; NUISANCES.

BOARDING MOVING CARS.

See CARRIERS OF PASSENGERS.

BOARDING TRAINS.

See CARRIERS OF PASSENGERS.

BONDS.

See TAXATION.

BOOKS.

See TAXATION.

BOSS.

See MASTER AND SERVANT.

BRAKE OF PARTICULAR KIND.

See MASTER AND SERVANT.

BRAKES.

See MASTER AND SERVANT.

BURDEN OF PROOF.

See BAGGAGE; CARRIERS OF LIVE STOCK; COMMON CARRIERS; CONNECTING CARRIERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE.

CALLS OF NATURE.

See TRESPASSERS.

CANCELLATION OF DEED.

See RIGHT OF WAY.

CARE DUE AFTER DISCOVERY OF PERIL.

See ACCIDENTS ON TRACK.

CARE DUE IN OPERATING TRAINS.

See MASTER AND SERVANT.

CARE DUE LICENSEES.

See LICENSEES.

CARE DUE PASSENGERS ON TRACK.

See CARRIERS OF PASSENGERS.

CARE DUE TRESPASSER.

See TRESPASSERS.

CARE EXERCISED BY INJURED FOREMAN CREDITED TO MASTER.

See MASTER AND SERVANT.

CARE REQUIRED IN DRIVING ON TRACKS.

See STREET RAILWAYS.

CARE REQUIRED OF LICENSEES.

See LICENSEES.

CARE REQUIRED OF MASTER.

See MASTER AND SERVANT.

CARE REQUIRED OF OTHER COMPANY.

See LICENSEES.

CARE REQUIRED OF PERSON IN PERILOUS POSITION.

See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT.

CARE REQUIRED OF SERVANT.

See MASTER AND SERVANT.

CARLISLE TABLES.

See PERSONAL INJURIES.

CARRIERS.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; CONNECTING CARRIERS; EXPRESS COMPANIES; STATIONS AND DEPOTS.

CARRIERS OF LIVE STOCK.

See COMMON CARRIERS.

Assumption that railroad's employees did their duty in watering stock. *Peterson v. Chicago M. & St. P. Ry. Co.* (S. Dak.), 48.

Burden of proving that negligence of carrier was proximate cause of injuries was on plaintiffs. *Peterson v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 48.

Carrier not responsible, as common carrier, but only as bailee, for stock placed in its stockyards for subsequent shipment, but subject to right of shipper to remove stock from the pens for feed and water before shipment is actually made. *Chicago, B. & Q. R. Co. v. Powers* (Neb.), 286.

Contributory Negligence.

Cattle delivered by carrier at yards infected by Texas fever, admissibility of evidence of a notice given by plaintiff to carrier as to what the former intended to do with the cattle after it learned of their infection, and giving carrier right to make other

CARRIERS OF LIVE STOCK—Continued.

disposition thereof if not satisfied. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.

Delay, not error to instruct, in action for, that the delay afforded reasonable evidence, in absence of explanation, that accident arose from want of care, though contract provided that carrier should not be liable for injuries to the stock unless the same were immediately caused by misconduct or actual negligence of the carrier, its agents, servants, or employees. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.

Evidence.

Admissibility of daily reports of cattle reloaded at Kansas City from southern cattle pens, bearing the signatures of the stock agents, enclosed in envelopes addressed to the government veterinarian at Des Moines, and notifying him of cattle shipped in quarantine. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.

In action against carrier for delay in transporting cattle, statement by defendant's conductor, made to plaintiff, during the transportation, in response to a question, "why don't you get over the road?" "I can't get any where with this dummy. They should have known better than to send it out this kind of weather," was admissible as *res gestæ*. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.

Parole evidence was admissible to show that it was customary to furnish an independent train for the transportation of stock, amounting to ten cars or upwards, when demanded. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.

In action for injuries from delay in transportation, the refusal of an instruction that each of the delays must be considered by itself, and that the fact that, if the first delay had not taken place, the second might have been avoided, would not impose a liability on defendant for the second delay, as the first would not then be the proximate cause, was not error. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.

Infected yards, railroad's knowledge of was question for jury, where there was evidence that it had unloaded there several cars of "ticky" cattle, under quarantine regulations. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.

Insufficiency of evidence of failure to "wet down" hogs. *Peterson v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 48.

Insufficiency of evidence that failure to "wet down" hogs was proximate cause of injuries. *Peterson v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 48.

Judicial notice that Texas or splenic fever is infectious or contagious; and a railroad transporting cattle is chargeable with notice of that fact. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.

Limiting Liability.

Delay in transportation of hogs, sufficiency of evidence of negligence where they were exposed to the sun and were in transit over 28 days without being fed or watered, as required by act of Congress, so as to render carrier liable, notwithstanding special contract limiting liability. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.

Federal court would not enforce stipulation in contract providing a 60-day limitation for an action thereon, which was void under express provisions of Civ. Code Mont. § 2245, though it was not prohibited by laws of Minnesota, where contract was made. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.

Market value of hogs lost in shipment was admissible notwithstanding a contract limiting liability for their loss to \$5 each, where the validity of the contract, as to consideration and otherwise, was in issue, and the court charged that, if contract was

CARRIERS OF LIVE STOCK—Continued.

- valid, the recovery should be limited to \$5 each. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.
- Notice of claim for damages, validity of stipulation limiting time within which it may be made. *Eckert v. Pennsylvania R. Co.* (Pa.), 475.
- Where it was agreed that the value for which carrier should be liable should not exceed \$5 for each hog, while their real value was two or three times that amount, the stipulation was void. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.
- Where it was agreed that the value for which the carrier should be liable should not exceed for a "horse or mule \$100, cattle \$30 each, * * * other animals at \$5 each," the term "other animals" included hogs. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.
- Petition alleging that carrier, through his "carelessness and negligence," placed plaintiff's cattle in certain yards, and wrongfully exposed them to infection, was sufficient to raise the issue of defendant's knowledge or imputed knowledge that the yards were infected. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.
- Proof justified instruction that jury might consider certain evidence relating to the question whether cattle being transported in a number greater than 10 car loads were or were not hauled by regular freight trains, or trains gotten up specially for the purpose of transporting them, in action for delay. *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 542.
- Question for jury whether plaintiff's agent knew of defect in car at time he loaded stock. *Nevius v. Chicago, St. P. & M. Ry. Co.* (Wis.), 65.
- Texas fever, railroads chargeable with notice that it is contagious. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.* (Iowa), 399.
- Transportation of cattle carrying southern ticks, into Kansas, illegal, in the absence of rules regulating their admission. *State v. Missouri Pac. Ry. Co.* (Kan.), 336.
- Transportation of cattle carrying southern ticks, into Kansas, may be enjoined as a nuisance. *State v. Missouri Pac. Ry. Co.* (Kan.), 336.
- Transportation of cattle carrying southern ticks, into Kansas, sections 7451, 7452, Kan. Gen. St. 1901, construed and applied. *State v. Missouri Pac. Ry. Co.* (Kan.), 336.
- Where carrier of live stock has actual knowledge of injuries to them within time limited, or notice thereof, and has not raised any question as to the want of notice until the trial, a year and a half thereafter, the question of formal notice is for the jury. *Eckert v. Pennsylvania R. Co.* (Pa.), 475.

CARRIERS OF PASSENGERS.

- See MONOPOLIES; PERSONAL INJURIES; STATIONS AND DEPOTS; TICKETS AND FARES; TRIAL; WITNESSES.
- Averment that a passenger train was running at a rate of about sixty miles an hour is not per se an allegation of negligence. *Chicago, R. I. & P. Ry. Co. v. Wheeler* (Kan.), 145.
- Breach of duty by carrier to its passenger constitutes the cause of action for injury to passenger therefrom, and the facts evidencing the breach are not the breach, but merely the facts which prove that the breach has occurred. *Philadelphia, B. & W. R. Co. v. Allen* (Md.), 581.
- Connections with train of another line, statement of ticket agent did not amount to guaranty of. *Latour v. Southern Ry.* (S. Car.), 379.
- Contributory Negligence.**
- Alighting from moving car, certain instruction, as modified, was proper, yet, as there could be no recovery, under defendants' evidence, regardless of the question of warning or no warning

CARRIERS OF PASSENGERS—Continued.

- by the conductor, the refusal to give the requests as asked was error. *Behen v. St. Louis Transit Co. (Mo.)*, 103.
- Alighting from moving car, concluding clause of charge did not, when considered with the entire charge, inject a question not litigated into the case, and was not necessarily misleading. *Cody v. Duluth St. Ry. Co. (Minn.)*, 117.
- Alighting from moving car, instruction properly refused as indefinite as to speed of car. *Cody v. Duluth St. Ry. Co. (Minn.)*, 117.
- Alighting on a dark night on wrong side of train. *Chesapeake & O. Ry. v. Harris (Va.)*, 139.
- Boarding, or alighting from, moving car. *Boulfrois v. United Traction Co. (Pa.)*, 70.
- Care required of street car passenger, injured by reason of panic caused by explosion of controller. *Chicago Union Traction Co. v. Newmiller (Ill.)*, 273.
- Degree of care required of passenger for his own protection. *Southern Ry. Co. v. Cunningham (Ga.)*, 374.
- Failure to look and listen for trains before attempting to cross intervening tracks to get from station to his train. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.
- Intoxication of passenger struck by freight train while crossing intervening tracks to take train, effect of on right to recover. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.
- Passenger injured by jerking of train, request to charge which would make the exercise of ordinary care on part of passenger dependent entirely on what was usual or customary with the railroad, or without reference to his knowledge of it or to the circumstances of the particular case, was properly refused. *Southern Ry. Co. v. Cunningham (Ga.)*, 374.
- Passenger injured by reason of negligent jerking of train, care required of him, and things to be considered in determining whether he has exercised such care. *Southern Ry. Co. v. Cunningham (Ga.)*, 274.
- Passenger standing on running board with knowledge of dangerous proximity of poles. *Burns v. Johnstown Pass. Ry. Co. (Pa.)*, 605.
- Passing from one car to another in quest of seat. *Chicago City Ry. Co. v. McCaughna (Ill.)*, 262.
- Protruding head through car window, passenger struck by trolley pole was guilty of contributory negligence precluding recovery. *Christensen v. Metropolitan St. Ry. Co. (C. C. A.)*, 250.
- Question for jury. *Normile v. Wheeling Traction Co. (W. Va.)*, 235.
- Reliance on direction of trainmen as to proper car to be taken. *Robertson v. Louisville & N. R. Co. (Ala.)*, 61.
- Riding on platform instead of hanging onto strap. *Chicago City Ry. Co. v. McCaughna (Ill.)*, 262.
- Riding on running board without necessity. *Burns v. Johnstown Pass. Ry. Co. (Pa.)*, 605.
- Right of alighting passenger to assume that carrier has performed its duties in making the approaches from its passenger cars to the station reasonably safe. *Chesapeake & O. Ry. v. Harris (Va.)*, 139.
- Right of passenger to assume, when crossing intervening tracks to get from station to his train, that such tracks will be free from danger. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.
- Sufficiency of evidence. *Barringer v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 112.
- Where plaintiff who was ignorant of the surroundings, was directed to get off a train and go to the depot, and people were getting off both sides of the train, evidence that he stated he did not get off on the other side because there was such a rush,

CARRIERS OF PASSENGERS—Continued.

and he never followed a crowd in a rush, did not show a want of due care. *Chesapeake & O. Ry. v. Harris* (Va.), 139.

Contributory negligence no defense where failure to warn intoxicated passenger of danger of going on platform of moving car. *Fox v. Michigan Cent. R. Co.* (Mich.), 124.

Damages.

Duty of injured passenger to minimize damages; but error to instruct that it was his duty to do some particular thing for that purpose. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Passenger carried to place not called for by his ticket. *Latour v. Southern Ry.* (S. Car.), 379.

Punitive damages may be awarded to female passenger who was rudely ejected from street car, and compelled to walk some distance in the mud, because of her refusal to comply with an unwarranted demand of the conductor that she change her seat in car. *Southern Light & Traction Co. v. Compton* (Miss.), 269.

Punitive damages recoverable if plaintiff was recklessly and wantonly thrown from car, even though act was not inspired by actual malice or ill will. *Lexington Ry. Co. v. O'Brien* (Ky.), 67.

Punitive damages were not recoverable for ejection of passenger, who had been directed by person in uniform to wrong train, and was ejected for refusal to pay additional fare. *Richardson v. Atlantic Coast Line R. R.* (S. Car.), 349.

Willfulness, malice, or other aggravating circumstances may be shown, as bearing on amount of recovery, where passenger was directed to wrong car by railroad employees. *Robertson v. Louisville & N. R. Co.* (Ala.), 61.

Damages sustained by passenger by reason of being directed to wrong car by railroad employees recoverable whether act of employees was negligent, willful or malicious. *Robertson v. Louisville & N. R. Co.* (Ala.), 61.

Degree of Care Required of Carrier.

Williams v. Spokane Falls & N. Ry. Co. (Wash.), 278.

Acts which extraordinary diligence requires to be done are not the same under all circumstances. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

At common law, carrier was bound to use extraordinary diligence. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Degree of care and duties which were due passenger struck by freight train while crossing intervening tracks to get from station to his train. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

Degree of care required of street railway in allowing passenger to board and get to place of safety on car. *Normile v. Wheeling Traction Co.* (W. Va.), 235.

Delay to passenger, carrier must exercise such care and effort to prevent as is due under the circumstances. *Latour v. Southern Ry.* (S. Car.), 379.

Extraordinary diligence, as applied to movement of starting, or stopping of mixed trains, and the jolts and jerks occurring in connection therewith, definition. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Extraordinary diligence in starting or stopping train, character of train, and other facts to be considered in determining whether it has been exercised. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Extraordinary diligence required, no matter what means of conveyance be employed—whether passenger train, freight, or mixed train. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Extreme care and caution which very prudent and thoughtful persons exercise under like circumstances. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Instruction rendering carrier liable for injuries to passenger

CARRIERS OF PASSENGERS—Continued.

caused by the "slightest negligence" was proper. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.

Question for jury whether extraordinary diligence has been exercised in starting or stopping train. *Southern Ry. Co. v. Cunningham* (Ga.), 374.

Utmost care which human foresight can exercise, though carrier is not an insurer of passenger's safety. *Philadelphia B. & W. R. Co. v. Allen* (Md.), 581.

Direction of verdict for defendant properly refused where intoxicated passenger went upon platform of moving car and fell or was thrown off. *Fox v. Michigan Cent. R. Co.* (Mich.), 124.

Duty of carrier to allow passenger reasonable opportunity for getting off train, and reasonable time is such as one of ordinary care, under the circumstances, should be allowed to take. *Barringer v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 112.

Duty of conductor of street car to warn passenger, about to pass from one car to another, that car was about to swing around corner, or to properly control car. *Chicago City Ry. Co. v. McCaughna* (Ill.), 262.

Duty of street car conductor not to start car until passenger has alighted, although he has had ample time to alight. *Behen v. St. Louis Transit Co.* (Mo.), 103.

Duty to give passenger time to alight, instruction properly modified by changing word "sufficient" to "reasonable." *Barringer v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 112.

Duty to give time to alight as affected by fact that passenger is intoxicated, no error in instructions given for defendant, when considered in connection with the instructions given for plaintiff. *Barringer v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 112.

Duty to warn intoxicated passenger of danger on platform while car was in motion. *Fox v. Michigan Cent. R. Co.* (Mich.), 124.

Ejection.

Amendment alleging that plaintiff tendered in payment of his fare a transfer slip which he believed he was entitled to use, but which conductor refused, and that thereafter he was ejected from the car, did not set up new cause of action. *Lexington Ry. Co. v. O'Brien* (Ky.), 67.

Insufficiency of evidence to support findings that conductor received plaintiff's ticket as entitling him to ride, or without notifying him that it was of no value, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the ticket which was taken up should be returned. *Elliott v. Southern Pac. Co.* (Cal.), 52.

Passenger cannot be lawfully ejected for failure to pay extra fare, demanded because he had no ticket, unless he was afforded opportunity to procure ticket. *Rivers v. Kansas City M. & B. R. Co.* (Miss.), 267.

Under Cal. Civ. Code, §§ 487, 2188, providing that a passenger who refuses to pay his fare or exhibit or surrender his ticket when requested so to do may be ejected, a passenger who exhibited a limited ticket, which had expired and was void, and refused to pay his fare, was properly ejected, although the conductor wrongfully retained the void ticket. *Elliott v. Southern Pac. Co.* (Cal.), 52.

Whether passenger had reasonable opportunity to procure ticket, or whether it was his fault, or that of the railroad's agents, that he failed to procure one, was question for jury. *Rivers v. Kansas City M. & B. R. Co.* (Miss.), 267.

Evidence.

As to city ordinance regulating speed of trains was immaterial, because of street car conductor's testimony, in action for injury to street car passenger resulting from a collision between his

CARRIERS OF PASSENGERS—Continued.

- car and a train at a crossing. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.
- Evidence that street car was stopped with unusual suddenness and a jerk, and that passenger was thereby thrown from his seat and injured raises question for jury on issue of negligence in manner of stopping car. *Ball v. Mobile Light & R. Co.* (Ala.), 614.
- Failure of fellow passengers to complain. *Foss v. Portsmouth D. & Y. Ry. Co.* (N. H.), 364.
- Free pass, providing that person accepting it agreed not to hold company liable for any damages to his person or property, was properly rejected on defendant's offer, under Miss. Code, 1892, § 683, providing that affirmative matter in avoidance shall not be proved under general issue unless defendant give notice thereof in writing, etc. *Yazoo & M. V. R. Co. v. Grant* (Miss.), 257.
- Freight train, carrier taking passenger on it is not required to equip it with conveniences for passengers. *Rogers v. Choctaw O. & G. R. Co.* (Ark.), 592.
- It was not error, because of instruction given, to refuse to charge that plaintiff could not recover unless jury believed from a preponderance of the evidence that plaintiff was in fact pushed and thrown from the car to the street, as charged in declaration. *Chicago Union Traction Co. v. Newmiller* (Ill.), 273.
- Limiting Liability.**
- Common carrier of passengers cannot contract against liability for damages from its own negligence. *Yazoo & M. V. R. Co. v. Grant* (Miss.), 257.
- Negligence of carrier proved by evidence that coupler had come apart several times before, that its servants knew it was liable to come apart, and that they threw off the safety chains simply to expedite business. *Williams v. Spokane Falls & N. Ry. Co.* (Wash.), 278.
- Negligence of conductor after discovery of passenger's peril was a question for jury. *Rogers v. Choctaw O. & G. R. Co.* (Ark.), 592.
- Negligence, sufficiency of declaration, in specifying particulars of, under Md. Code. Pub. Gen. Laws 1904, art. 75, § 14. *Philadelphia B. & W. R. Co. v. Allen* (Md.), 581.
- Negligence, sufficiency of evidence of where passenger fell into ditch while going from train to platform at night. *Chesapeake & O. Ry. v. Harris* (Va.), 139.
- Negligence was a question for jury where passenger was struck by a train while crossing intervening tracks to get from station to his train. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.
- No defense to action for injury to passenger that carrier did as other carriers have customarily done. *Williams v. Spokane Falls & N. Ry. Co.* (Wash.), 278.
- Passenger injured by reason of starting car with sudden jerk, liability depending upon whether passenger had safely boarded moving car or was attempting to do so. *Boulfrois v. United Traction Co.* (Pa.), 70.
- Passenger left at intermediate station as result of boarding wrong car, recovery depended on whether or not her action was directed by railroad employees of the train on which she was riding. *Robertson v. Louisville & N. R. Co.* (Ala.), 61.
- Passenger left at intermediate station as result of boarding wrong car there, charge that she could not recover unless defendant's "conductor and flagman" told her to get on wrong car, was not warranted by evidence. *Robertson v. Louisville & N. R. Co.* (Ala.), 61.
- Petition alleging that the car was started without giving passenger time to alight, and that the conductor allowed the passenger to get off the car while it was in motion, in violation of an ordinance of the city, was inconsistent in its parts, and a motion to compel

CARRIERS OF PASSENGERS—Continued.

an election should have been sustained. *Behen v. St. Louis Transit Co. (Mo.)*, 103.

Plaintiff could not rely on defendant's testimony to make out a case under an ordinance prohibiting conductors to permit passengers to alight from a moving car, as in order to do so, he would have had to repudiate his own testimony, and the allegations of the petition on which such testimony was based. *Behen v. St. Louis Transit Co. (Mo.)*, 103.

Presumption of Negligence.

Injury to passenger from breaking or failure of a vehicle, roadway, or other appliances, common-law rule. *Southern Ry. Co. v. Cunningham (Ga.)*, 374.

Passenger on street car injured by reason of panic caused by explosion of controller. *Chicago Union Traction Co. v. Newmiller (Ill.)*, 273.

Prima facie case made out by evidence that injury to passenger was connected with operation of railroad. *Williams v. Spokane Falls & N. Ry. Co. (Wash.)*, 278.

Prima facie case of negligence where passenger is injured, under Kirby's Dig. § 6773. *Barringer v. St. Louis, I. M. & S. E. Ry. Co. (Ark.)*, 112.

Proximate cause of collision and injury to street car passenger, where fault of street car conductor in signaling to motorman to cross when he knew train was approaching contributed in part to the injury. *Chicago City Ry. Co. v. Shaw (Ill.)*, 586.

Right of engineer to assume that passenger crossing intervening tracks to get from station to his train would avoid danger. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.

Rule of carrier requiring train of inferior class to take siding and clear train of superior class on meeting such a train, and requiring a train of inferior class to keep five minutes off the time of train of superior class following it was not applicable. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.

Rule of carrier requiring train of inferior class to take siding and clear train of superior class on meeting such a train requires a freight train, on meeting a passenger train, to clear it by getting on a siding, but does not require the freight train, when it is upon the siding, to remain in the same place. *Illinois Cent. R. Co. v. Proctor (Ky.)*, 531.

Screens for street car windows, whether sufficient to prevent passengers from being struck by trolley poles. *Christensen v. Metropolitan St. Ry. Co. (C. C. A.)*, 250.

Separation of White and Colored Passengers.

"Adjustable screens" in street cars, certain signs were not, within meaning of Miss. Laws 1904, p. 140, c. 99. *Southern Light & Traction Co. v. Compton (Miss.)*, 269.

Carriers, who had not sufficiently complied with Miss. Laws 1904, c. 99, p. 140, requiring adjustable screens in street car, could not invoke provision of the law authorizing conductor to move screens separating races according to needs of traffic, and to put off passengers who refuse to accommodate themselves to such adjustment, as a justification for his act in ejecting a passenger. *Southern Light & Traction Co. v. Compton (Miss.)*, 269.

Sickness of passenger directed by porter to ride in smoker, carrier not liable where absence of appeal to conductor for other quarters. *Brezewitz v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 347.

Where action is brought for maltreatment of passenger by carrier, and is not based on its failure to make connection with trains of another road, an instruction that railroad companies do not guaranty connections is not reversible error. *Latour v. Southern Ry. (S. Car.)*, 379.

Whether engineer exercised proper care after seeing passenger

CARRIERS OF PASSENGERS—Continued.

crossing intervening tracks to get from station to his train. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

Who Are Passengers.

Child riding on street car with his parent, evidence of custom of carrier not to charge fare for carriage of small children was competent. *Ball v. Mobile Light & R. Co.* (Ala.), 614.

Holder of return coupon of ticket purchased from defendant while at depot to take train. *Chicago & A. R. Co. v. Walker* (Ill.), 596.

One walking on side track from depot to train on main track, in order to take passage on such train, was a passenger. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

Passenger failing to leave train because of carrier's failure to awaken him. *Bass v. Cleveland, C., C. & St. L. Ry. Co.* (Mich.), 600.

Small child riding on street car with his mother, without paying fare. *Ball v. Mobile Light & R. Co.* (Ala.), 614.

CARRYING BEYOND DESTINATION.

See CARRIERS OF PASSENGERS.

CARS.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; CONNECTING CARRIERS; MONOPOLIES.

CAR SEEN IN TIME.

See CROSSINGS.

CAR SERVICE.

See COMMON CARRIERS; INJUNCTIONS.

CASH VALUE.

See TAXATION.

CATTLE.

See STOCK, INJURIES TO.

CATTLE GUARDS.

See STOCK, INJURIES TO.

CAUSE OF ACTION.

See CARRIERS OF PASSENGERS; NEGLIGENCE; BAGGAGE.

CHARACTER OF EMPLOYMENT.

See MASTER AND SERVANT.

CHARGES.

See COMMON CARRIERS; CONNECTING CARRIERS.

CHARTER POWERS.

See COMMON CARRIERS.

CHARTERS.

See RAILROADS.

CHECKS.

See BAGGAGE.

CHILDBEARING POWER.

See PERSONAL INJURIES.

CHILDREN.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; TRESPASSERS.

Contributory Negligence.

Contributory negligence of father, sufficiency of allegation of, under N. Car. Code, § 260, by administrator of his deceased infant child, to recover for its death. *Davis v. Seaboard Air Line Ry. (N. Car.)*, 163.

Father's contributory negligence available as a defense, in action by administrator of deceased infant to recover for its death. *Davis v. Seaboard Air Line Ry. (N. Car.)*, 163.

Of father, in permitting child of tender years to go on railroad track unattended, affect of in action by father for death of child. *St. Louis Southwestern Ry. Co. v. Cochran (Ark.)*, 798.

Railroad not liable for failure to guard against injury to child about three years old, who strayed upon its land and climbed upon or fell into pile of hot soot, such land, practically an open lot, having been used as a dumping ground for soot from a heating plant for several years. *Fitzmaurice v. Connecticut Ry. & L. Co. (Conn.)*, 788.

CIRCUMSTANCES TO BE CONSIDERED.

See FIRES SET BY LOCOMOTIVES.

CIRCUMSTANTIAL EVIDENCE.

See FIRES SET BY LOCOMOTIVES.

CLASSIFICATION.

See TAXATION.

CLEARING TRAINS.

See CARRIERS OF PASSENGERS.

CLIMATERIC.

See PERSONAL INJURIES.

COLLATERAL TESTIMONY.

See CARRIERS OF PASSENGERS.

COLLISION BETWEEN TRAIN AND STREET CAR.

See CARRIERS OF PASSENGERS.

COLLISIONS.

See CROSSINGS; MASTER AND SERVANT; STREET RAILWAYS.

COLLISIONS WITH TEAM.

See STREET RAILWAYS.

COLORED PERSONS.

See CARRIERS OF PASSENGERS.

COMBINATIONS IN RESTRAINT OF TRADE.

See MONOPOLIES.

COMBUSTIBLES ON RIGHT OF WAY.

See FIRES SET BY LOCOMOTIVES.

COMMANDERS ON HAND CARS.

See MASTER AND SERVANT.

COMMAND OF SUPERIOR.

See MASTER AND SERVANT.

COMMISSIONS.

See RAILROADS.

COMMON CARRIERS.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; INJUNCTIONS.

Beginning of carrier's liability. *Chicago, B. & Q. R. Co. v. Powers* (Neb.), 286.

Burden of proof on carrier where cotton on platform is destroyed, scope of. *Lehman, Stern & Co. v. Morgan's Louisiana & Texas R. & S. S. Co.* (La.), 559.

Burden of proving negligence on shipper where shipment under limited liability contract. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.

Burden on carrier to show that loss resulted from cause for which it was not responsible, such as the act of God or the public enemy. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.

Burden on carrier, under Civil Code of Louisiana, to prove that loss or injury to freight by fire has been occasioned by accidental and uncontrollable events. *Lehman, Stern & Co. v. Morgan's Louisiana & Texas R. & S. S. Co.* (La.), 559.

Cannot lawfully refuse to transport intoxicating liquors merely because of the passage of an invalid municipal ordinance at the destination point, purporting to make payment of license tax a condition precedent to the right to deliver such freight. *Southern Express Co. v. R. M. Rose Co.* (Ga.), 565.

Carrier acquires no right to hold goods delivered to it by wrongdoer, to whom they do not belong, until the charges are paid against the claim of the true owner; nor has the carrier any lien on the goods for charges. *Savannah, F. & W. Ry. Co. v. Tolbert* (Ga.), 288.

Carrier's liability does not attach until freight is unconditionally delivered by shipper and accepted by carrier. *Chicago, B. & Q. R. Co. v. Powers* (Neb.), 286.

Contributory Negligence.

Assumption that injury to fruit resulted from shipper's failure to supply sufficient ice for car was warranted. *Chicago, I. & L. Ry. Co. v. Reyman* (Ind.), 557.

Conversion of unclaimed freight, shipment by carrier to another point for sale. *Central of Georgia Ry. Co. v. Chicago Portrait Co.* (Ga.), 85.

Corpse and coffin of husband injured by weather while left on open platform by carrier, declaration, in action by widow, set out cause of action. *Louisville & N. R. Co. v. Wilson* (Ga.), 389.

Damages.

Attorney's fees, allegations of petition, in action against carrier for conversion of freight, were not sufficient to authorize recovery of. *Central of Georgia Ry. Co. v. Chicago Portrait Co.* (Ga.), 85.

Expenses of plaintiff's agent, incurred while waiting for delivery of freight upon statement of carriers' agent that it had not arrived, when in fact it was then in his possession. *Central of Georgia Ry. Co. v. Chicago Portrait Co.* (Ga.), 85.

Where box of pictures is shipped with household effects and billed as glass, in absence of actual fraud, carrier is only liable for value of a box of household glass. *Bottum v. Charleston & W. C. Ry. Co.* (S. Car.), 602

Discrimination.

Where railroad establishes as to certain favored class of shippers a rate so low as to be unremunerative, it must be also granted to all alike. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.

Duty to receive freight for transportation enforceable by private

COMMON CARRIERS—Continued.

party in mandamus proceedings. *Southern Express Co. v. R. M. Rose Co. (Ga.)*, 565.

Duty to receive freight for transportation. *Southern Express Co. v. R. M. Rose Co. (Ga.)*, 565.

Evidence.

In action against carrier for loss of box of goods, evidence as to its contents is admissible. *Bottum v. Charleston & W. C. Ry. Co. (S. Car.)*, 602.

Fire, carrier not insurer against, under Civil Code of Louisiana. *Lehman, Stern & Co. v. Morgan's Louisiana & Texas R. & S. S. Co. (La.)*, 559.

Limiting Liability.

Carrier must offer, or be ready on demand, to ship freight without its liability being limited. *Nashville, C. & St. L. Ry. v. Stone & Haslett (Tenn.)*, 88.

Contract to be construed liberally in favor of shipper. *Welch v. Northern Pac. Ry. Co. (N. Dak.)*, 343.

Conversion of goods, carrier could not invoke agreed valuation. *Central of Georgia Ry. Co. v. Chicago Portrait Co. (Ga.)*, 85.

Corporation commission, cannot, in consideration of a low rate, limit liability of carrier for loss of goods through its negligence, at less than their value. *Everett v. Norfolk & S. R. Co. (N. Car.)*, 551.

Evidence of shippers that carrier never offered them any contract except one containing a limitation of its liability was admissible to show that carrier did not hold itself ready to make a contract of shipment in which it should assume common-law liability. *Nashville, C. & St. L. Ry. v. Stone & Haslett (Tenn.)*, 88.

Negligence. *Eckert v. Pennsylvania R. Co. (Pa.)*, 475.

Negligence. *Yazoo & M. V. R. Co. v. Grant (Miss.)*, 257.

Railroad cannot by contract with shipper relieve itself of liability for negligence in supplying unsuitable cars. *Nevius v. Chicago, St. P. & M. Ry. Co. (Wis.)*, 65.

Regulation of Corporation Commission fixing a certain freight rate on household goods, limited to \$5 per hundredweight in value and "released," is not intended to fix the liability of the carrier, for loss of the goods through its negligence, at, less than their value. *Everett v. Norfolk & S. R. Co. (N. Car.)*, 551.

Shipper cannot, in absence of fraud, avoid limitations, by showing that he executed contract hurriedly or without due care, or that he was ignorant of contents of contract. *Nashville, C. & St. L. Ry. v. Stone & Haslett (Tenn.)*, 88.

Ordinance purporting to make the payment of a license tax by the carrier a condition precedent to its right to transport intoxicants into the municipality, power of city to enact. *Southern Express Co. v. R. M. Rose Co. (Ga.)*, 565.

Presumption of negligence from loss of freight. *Everett v. Norfolk & S. R. Co. (N. Car.)*, 551.

Proof of the usual and ordinary diligence in such cases to safeguard the cotton will not avail the carrier as a defense, where it was damaged by fire, the cause of which is not shown or explained, while on platform. *Lehman, Stern & Co. v. Morgan's Louisiana & Texas R. & S. S. Co. (La.)*, 559.

Railroad, which serves business houses located along a spur track, is a common carrier with respect to the use it makes of such track, and is bound to treat them without discrimination with respect to car service. *W. C. Agee & Co. v. Louisville & N. R. Co. (Ala.)*, 129.

Special interest of relator, a merchant, to compel carrier to accept for transportation, and deliver to him goods in which he deals. *Southern Express Co. v. R. M. Rose Co. (Ga.)*, 565.

COMMON CARRIERS—Continued.

Sufficiency of evidence to warrant verdict against carrier for actual value of goods converted. *Central of Georgia Ry. Co. v. Chicago Portrait Co. (Ga.)*, 85.

Tort or contract, shipper may bring either kind of action for injury to freight. *Eckert v. Pennsylvania R. Co. (Pa.)*, 475.

Where pictures are shipped in a box marked "glass," the carrier is not required to inquire into the nature and value of the contents of the box. *Bottum v. Charleston & W. C. Ry. Co. (S. Car.)*, 602.

COMMON LAW.

See STOCK, INJURIES TO.

Presumption that it was of force in another state, where personal injury occurred. *Southern Ry. Co. v. Cunningham (Ga.)*, 374.

COMPANIONS.

See CONTRIBUTORY NEGLIGENCE.

COMPENSATION.

See RIGHT OF WAY.

COMPETENCY.

See EVIDENCE.

COMPETITION.

See MONOPOLIES.

COMPLAINTS OF OTHER PASSENGERS.

See CARRIERS OF PASSENGERS.

CONCURRENT NEGLIGENCE.

See NEGLIGENCE; FELLOW SERVANTS; MASTER AND SERVANT.

CONDEMNATION PROCEEDINGS.

See EMINENT DOMAIN.

CONDITIONAL DELIVERY TO CARRIER.

See CARRIERS OF LIVE STOCK.

CONDUCTORS.

See FELLOW SERVANTS.

CONDUCTOR'S IGNORANCE.

See TICKETS AND FARES.

CONNECTING CARRIERS.

See TICKETS AND FARES.

Burden of proving that injury to freight occurred on one of the other connecting lines, instruction placed greater burden on terminal carrier that was required by law. *Houston & T. C. R. Co. v. Everett (Tex.)*, 578.

Freezing of vegetables because of defect in car furnished by initial carrier and received by connecting carrier in apparently good condition, latter not liable. *St. Louis Southwestern Ry. Co. v. Myer (Ark.)*, 387.

Initial carrier's duty to deliver horses at terminus of its road to connecting carrier in suitable cars. *Eckert v. Pennsylvania R. Co. (Pa.)*, 475.

Initial carrier taking horses for transportation beyond its own line and transferring them to an unsuitable car, and thereby causing injury to them, is liable for the loss. *Eckert v. Pennsylvania R. Co. (Pa.)*, 475.

CONNECTING CARRIERS—Continued.**Limiting Liability.**

- To own line, initial carrier not liable where it delivered the hogs to forwarding carrier in good condition without unnecessary delay. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.
- To own line, necessity of consideration. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.), 88.
- Rebiling rate, definition. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Rebiling rate, discrimination. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Rebiling rate, putting it in force to be held a voluntary act, in absence of proof of any action by railroad commission. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Rebiling rate, validity. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Rebiling rates, power of railroad commission to prevent discrimination. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Rebiling rates, sufficiency of evidence of discrimination. *Alabama & V. Ry. Co. v. Railroad Commission* (Miss.), 366.
- Termination of initial carrier's liability. *Southern Ry. Co. v. Vaughn* (Miss.), 334.
- Where initial carrier had no authority from connecting carriers to contract for through shipments except by a certain route, a shipper contracting for through shipment could not recover damages to the shipment occasioned by their having gone that way instead of another, as requested; he knowing such limitation of the carrier's authority. *Houston & T. C. R. Co. v. Everett* (Tex.), 578.

CONNECTING RAILROADS.

See GARNISHMENT.

CONNECTIONS WITH TRAINS OF OTHER LINES.

See CARRIERS OF PASSENGERS.

CONSIDERATION.

See COMMON CARRIERS.

CONSIDERATION OF RELEASE.

See MASTER AND SERVANT.

CONSTITUTIONAL LAW.

See EMPLOYERS' LIABILITY ACTS; EXPRESS COMPANIES; MONOPOLIES; TAXATION.

CONSTRUCTION.

See EMINENT DOMAIN.

CONSTRUCTION OF CONTRACTS.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; MASTER AND SERVANT; NUISANCES.

CONTAGION.

See CARRIERS OF LIVE STOCK.

CONTRACT OF CONNECTING CARRIER TO SEND INSTRUCTIONS FOR DELIVERY OF TICKET.

See TICKETS AND FARES.

CONTRACT OR TORT.

See COMMON CARRIERS.

CONTRACTORS.

See INDEPENDENT CONTRACTORS; LICENSEES.

CONTRACTS.

See CARRIERS OF LIVE STOCK; EMPLOYERS' LIABILITY ACTS; LEASES AND RUNNING POWERS; MASTER AND SERVANT; TICKETS AND FARES.

CONTRACTUAL OBLIGATIONS.

See STREET RAILWAYS.

CONTRARY TO RULES.

See PERSONAL INJURIES.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; EVIDENCE; LICENSEES; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

Burden of proving. *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 168.

Care required of one in face of danger. *South Chicago City Ry. Co. v. Kinnare* (Ill.), 229.

Charge that decedent was not guilty of contributory negligence, if he was injured and killed while using such means as then appeared to him to be reasonably necessary to avoid danger was erroneous. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Charge that, if decedent was killed while acting as a person of ordinary prudence placed in such a position might reasonably act, it was immaterial that he might have escaped injury if he had followed some other course, should have been given, instead of the one given. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Contributory negligence of driver of private team struck by street car is not imputable to one riding as his guest or companion. *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 168.

Degree of care required for self-protection. *Normile v. Wheeling Traction Co.* (W. Va.), 235.

Does not prevent recovery where there was also negligence after discovery of plaintiff's peril. *Green v. Los Angeles Terminal Ry. Co.* (Cal.), 192.

Effect of. *Moulton v. Sanford & C. P. Ry. Co.* (Me.), 154.

Exposing self to know danger, person guilty of does not assume responsibility for other dangers which are unknown, and could not by the exercise of ordinary care have been discovered. *Holmes v. Chicago R. I. & P. Ry. Co.* (Neb.), 485.

Harmless error in instruction authorizing, but not requiring, jury to consider decedent's contributory negligence in mitigation of damages, where plaintiff remitted \$3,000 from a verdict of \$10,000. *Louisville & N. R. Co. v. Martin* (Tenn.), 413.

In action for death of flagman by being struck by train while on track, an instruction that jury "may," instead of "must," consider deceased's contributory negligence in mitigation of damages, was affirmative error. *Louisville & N. R. Co. v. Martin* (Tenn.), 413.

Instruction was a fair one on the doctrine of contributory negligence, in action for death of one killed while working in a dangerous place. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

Instruction was misleading, as leading the jury to believe that the defense could only be raised by affirmative evidence offered by defendant, thus withdrawing from the jury the evidence introduced by plaintiff on presenting his case. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.

In view of certain instructions, another instruction—that ordinary care is that which an ordinarily prudent person, situated as de-

CONTRIBUTORY NEGLIGENCE—Continued.

ceased was before and at time of accident, would exercise for his own safety—was not erroneous on the theory that it assumed that deceased was not guilty of contributory negligence in being in the position in which he found himself at time of the injury. *South Chicago City Ry. Co. v. Kinnare* (Ill.), 229.

Not error to omit to instruct as to law of, at plaintiff's requests, where defendant's instructions fully and fairly cover the point. *Normile v. Wheeling Traction Co.* (W. Va.), 235.

Not presumed, but is a matter of defense to be proved by defendant, unless it is shown by plaintiff's evidence. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.

Question for jury whether deceased, while under influence of sudden fear, so conducted himself as to incur imputation of contributory negligence. *South Chicago City Ry. Co. v. Kinnare* (Ill.), 229.

Was question for jury. *Holems v. Chicago, R. I. & P. Ry. Co.* (Neb.), 485.

When case may be withdrawn from jury. *Christensen v. Metropolitan St. Ry. Co.* (C. C. A.), 250.

CONTRIBUTORY NEGLIGENCE AND FAILURE TO GIVE SIGNALS.

See CROSSINGS.

CONTRIBUTORY NEGLIGENCE AND UNLAWFUL SPEED.

See CROSSINGS.

CONTRIBUTORY NEGLIGENCE OF FATHER.

See CHILDREN.

CONTRIBUTORY NEGLIGENCE OF PARENTS.

See CHILDREN.

CONVERSION.

See CARRIERS OF GOODS.

CONVEYANCES.

See RIGHT OF WAY.

COPARTNERSHIPS.

See EXPRESS COMPANIES.

CORPORATE EXISTENCE.

See LEASES AND RUNNING POWERS.

CORPORATE LIMITS.

See RAILROADS.

CORPORATION COMMISSION.

See COMMON CARRIERS.

CORPORATIONS.

See EMINENT DOMAIN; EXPRESS COMPANIES; RAILROADS.

CORPSES.

See COMMON CARRIERS; DAMAGES.

COST OF RAILROAD.

See TAXATION.

COUNTRY CROSSINGS.

See CROSSINGS.

COUPLINGS.

See CARRIERS OF PASSENGERS.

CREDITS.

See TAXATION.

CROSS-EXAMINATION.

See PERSONAL INJURIES.

CROSSING INTERVENING TRACKS.

See CARRIERS OF PASSENGERS.

CROSSING SIGNALS.

See TRESPASSERS.

CROSSINGS.

See ACCIDENTS ON TRACK; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; EVIDENCE; LEASES AND RUNNING POWERS; NEGLIGENCE; RAILROADS.

Contributory Negligence.

Attempting to drive across tracks in front of approaching street car. *Omaha St. Ry. Co. v. Mathiesen* (Neb.), 509.

Charge that, if decedent was killed while acting as a person of ordinary prudence placed in such a position might reasonably act, it was immaterial that he might have escaped injury if he had followed some other course, should have been given in place of the one given. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Decedent's precluded recovery. *Stokes' Adm'x v. Southern Ry. Co.* (Va.), 731.

Degree of care required of highway traveler. *Thomas v. Central of Georgia Ry. Co.* (Ga.), 191.

Evidence was insufficient to warrant finding that deceased saw the engine until in a moment of peril, and hence there was no presumption that she trusted that the engineer was obeying ordinance limiting speed of trains to six miles an hour. *Green v. Missouri Pac. Ry. Co.* (Mo.), 793.

Exclusion of testimony to show that car might have been seen at a greater distance was erroneous, as the question was whether plaintiff was guilty of negligence in attempting to cross tracks with the car at the distance it actually was when he saw it. *Omaha St. Ry. Co. v. Mathiesen* (Neb.), 509.

In action for injuries at a crossing, question whether or not defendant's right of way at or near the crossing had on it undergrowth which prevented the traveler from seeing the approaching train was material. *Stokes' Adm'x v. Southern Ry. Co.* (Va.), 731.

One who in broad daylight stops beside a street car track till the car approaching at an unlawful speed is within ten feet of him, when he attempts to cross in front of it, is guilty of contributory negligence, as matter of law, barring recovery for his injury. *Wolf v. City & Suburban Ry. Co.* (Ore.), 210.

Person riding in buggy, who, when at a safe distance from track, undertook to cross a railway crossing ahead of a train which he knew was approaching, assumed the risk of any resulting injury. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 174.

Where proximate cause of collision with train was contributory negligence the question of the negligent management of the train immaterial. *Stokes' Adm'x v. Southern Ry. Co.* (Va.), 731.

Contributory negligence in deliberately attempting to get across tracks before train could reach point prevents recovery, although train was running at negligent speed when it struck plaintiff, though

CROSSINGS.—Continued.

there had been failure to check speed in approaching the crossing, near which the accident happened. *Thomas v. Central of Georgia Ry. Co. (Ga.)*, 191.

Contributory negligence, unlawful speed of train, and failure to give statutory signals, railroad not liable for injury to pedestrian. *Green v. Missouri Pac. Ry. Co. (Mo.)*, 793.

Dedication of crossing in street to the public implied, though railroad division superintendent, under whose direction it was constructed, had no authority to make a valid dedication, and though his unexpressed purpose in making the crossing was merely to accommodate settlers coming in on trains. *Larson v. Chicago M. & St. P. Ry. Co. (S. Dak.)*, 465.

Duty of engineer after discovery of person's peril. *Green v. Los Angeles Terminal Ry. Co. (Cal.)*, 192.

Evidence.

Evidence relating to the crossing of a wagon in front of a freight train more than 30 years before the accident, as to the time it required a wagon and team different from that used by decedent to go over the track at the crossing, and as to the speed of another train, was inadmissible. *Stokes' Adm'x v. Southern Ry. Co. (Va.)*, 731.

Refusal to permit witness to state condition of right of way at the crossing five hours after the accident was not prejudicial; it being clear from the evidence that he had stated that he did not know what the condition of the right of way was at the time. *Stokes' Adm'x v. Southern Ry. Co. (Va.)*, 731.

Testimony that crossing was dangerous was incompetent. *Louisville & N. R. Co. v. Molloy's Adm'x (Ky.)*, 714.

Gates.

Care required of pedestrian as affected by fact that gates are open. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Opening gates as an invitation to cross. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Last clear chance, insufficiency of evidence to show that doctrine was applicable. *Brammer's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 497.

Negligence, act of fireman in "hooking" his fire as engine emerged from cut was not, although it temporarily prevented him from viewing crossing. *Brammer's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 497.

Negligence in operating train was question for jury. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

One approaching railroad track is not in a position of danger, so as to charge engineer of approaching train with notice thereof, and with the duty of using every exertion to avoid injuring him, until he steps upon the track. *Green v. Los Angeles Terminal Ry. Co. (Cal.)*, 192.

Proximate cause when train should have been seen in time by deceased and there was failure to give signals. *Brammer's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 497.

Right of engineer to assume that person approaching crossing will keep out of danger. *Green v. Los Angeles Terminal Ry. Co. (Cal.)*, 192.

Signals.

Certain statute of Missouri makes proof of accident and of failure to ring bell as required sufficient for a prima facie case, and to throw on railroad the burden of proving that the accident was not the result of failure to signal; but where plaintiff, in proving the accident, also shows that it was not caused by failure to signal, or the person injured was negligent, there is nothing for the railroad to prove in order to prevail. *Green v. Missouri Pac. Ry. Co. (Mo.)*, 793.

CROSSINGS.—Continued.

Failure to ring bell as evidence of negligence under New Hampshire statute. *Tucker v. Boston & M. R. R.* (N. H.), 294.

Failure to ring bell, sufficiency of evidence of. *Tucker v. Boston & M. R. R.* (N. H.), 294.

Ky. St. 1903, § 786, applicable to crossing outside settled portion of town, and which is in effect a country crossing. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Proximate cause, finding that it was failure to give signals was warranted by evidence. *Louisville & N. R. Co. v. Crominarity* (Miss.), 513.

Where speed of a train is great, care commensurate with the danger in giving warning of the approach of train must be observed. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Speed of trains, rule requiring it to be moderated at crossings not applicable to crossings not within settled part of town and which are practically country crossings; and at such crossings no rate of speed is negligent; but where the speed of a train is great, care commensurate with the danger in giving warning of the approach of train must be observed. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Stop, Look, and Listen.

Care required of person about to cross railroad tracks. *Brammer's Adm'r v. Norfolk & W. R. Co.* (Va.), 497.

Contributory negligence in not taking precautions just before stepping on track at point where view of train, which should have been previously seen when a long way off, was obstructed. *Thomas v. Central of Georgia Ry. Co.* (Ga.), 191.

Duty of highway traveler to look and listen. *Stokes' Adm'x v. Southern Ry. Co.* (Va.), 731.

Excessive speed of trains, care required of traveler as affected by. *Green v. Los Angeles Terminal Ry. Co.* (Cal.), 192.

Plaintiff was not guilty of contributory negligence, as matter of law, for failing to stop vehicle; it appearing that no train was scheduled to pass; that his view of track was obstructed except for the width of the street; and that he slowed up and listened for a train. *Louisville & N. R. Co. v. Crominarity* (Miss.), 513.

CROSSINGS IN SUBURBS.

See CROSSINGS.

CUSTOM AND USAGE.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS.

CUSTOM NOT CHARGE FOR CHILDREN.

See CARRIERS OF PASSENGERS.

CUSTOM OF DECEASED.

See DEATH BY WRONGFUL ACT.

CUSTOM OF OTHER CARRIERS AS A DEFENSE.

See CARRIERS OF PASSENGERS.

DAMAGES.

See ACTIONS; BAGGAGE; CARRIERS OF PASSENGERS; COMMON CARRIERS; CONTRIBUTORY NEGLIGENCE; EMINENT DOMAIN; NUISANCES; PERSONAL INJURIES; RIGHT OF WAY.

Injuries sustained in plaintiff's person and in his property in a single collision with a railroad train gives rise to but one cause of action, and damages for both classes of injuries must be recovered in a single suit. *Mobile & O. R. Co. v. Matthews* (Tenn.), 747.

DAMAGES.—Continued.

Punitive damages, instruction as to should clearly tell jury that the giving of such damages is matter of discretion. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.

Widow has interest in unburied corpse of husband which courts will recognize. *Louisville & N. R. Co. v. Wilson* (Ga.), 389.

\$12,500 was not excessive verdict for death of fireman. *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 665.

DANGEROUS PLACE TO WORK.

See CONTRIBUTORY NEGLIGENCE.

DANGEROUS POSITION.

See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; NEGLIGENCE.

DANGEROUS PREMISES.

See CHILDREN; STATIONS AND DEPOTS.

DEAD BODIES.

See COMMON CARRIERS; DAMAGES.

DEATH BY WRONGFUL ACT.

See ACCIDENTS ON TRACK; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMAGES; EVIDENCE; STREET RAILWAYS.

Brakeman found dead between car and tender, after he had failed to warn engineer or conductor that he was going between cars to make an uncoupling, insufficiency of evidence of cause of accident, or that deceased was in exercise of due care. *Donaldson v. New York, N. H. & H. R. Co.* (Mass.), 424.

Burden of proving that decedent was in the exercise of ordinary care was on plaintiff, in action for death of person struck by street car, though the motorman was negligent just before the accident. *Gorham v. Milford, etc., Ry. Co.* (Mass.), 745.

Certain section of Shannon's Code, providing for institution of action by personal representatives, widow, or children of person injured, and section providing that an action commenced by deceased before his death shall proceed without revivor, and section defining the damages recoverable in such actions, construed. *Stuber v. Louisville & N. R. Co.* (Tenn.), 405.

Contributory Negligence.

Evidence did not prove decedent's freedom from contributory negligence, notwithstanding the motorman's negligence just before the accident. *Gorham v. Milford, etc., Ry. Co.* (Mass.), 745.

Evidence that deceased was familiar with crossing, and that it was his habit to stop, look, and listen for trains was sufficient to sustain finding that he was in the exercise of due care. *Tucker v. Boston & M. R. R.* (N. H.), 294.

Presumption of due care on part of deceased. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

Damages.

Excessive verdict in action for injuries resulting in death. *Stuber v. Louisville & N. R. Co.* (Tenn.), 405.

Instruction, in action by minor child for death of parent, under Texas statute, was misleading, in that it expressly excluded improper element of damages, sorrow and anguish, and did not also exclude the other improper element, loss of society. *International & G. N. Ry. Co. v. McVey* (Tex.), 505.

Parent's death, elements of damages recoverable, under Texas statute, in action by minor child. *International & G. N. Ry. Co. v. McVey* (Tex.), 505.

DEATH BY WRONGFUL ACT.—Continued.**Evidence.**

Habit and custom of deceased to stop, look, and listen for trains at the crossing, admissibility. *Tucker v. Boston & M. R. R.* (N. H.), 294.

Photographs of plaintiff's decedent, taken just before, and also after, the injury causing the death, are admissible. *Davis v. Seaboard Air Line Ry.* (N. Car.), 163.

In action for death, alleged to have resulted from running street car against bicycle, the negligence charged in the original count and that charged in an additional count were the same, and hence a plea of limitations to the additional count was properly overruled. *South Chicago City Ry. Co. v. Kinnare* (Ill.), 229.

Motorman of street car not a "driver," within Mo. Rev. St., 1899, § 2864, giving an action for death from negligence of any "driver of any stage coach or other public conveyance." *Drolshagen v. Union Depot R. Co.* (Mo.), 223.

No action can be maintained in the courts of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the state of Ohio. *Baltimore & O. R. Co. v. Chambers* (Ohio), 766.

Presumption of due care on part of deceased employee, effect of on question of master's negligence. *Looney v. Metropolitan R. Co.*, etc. (U. S.), 617.

Right of action given by Mo. Rev. St., 1899, § 2864, survives to the administrator of the party in whose favor it accrues. *Behen v. St. Louis Transit Co.* (Mo.), 103.

Under N. Car. Code, § 1498, an action may be maintained by an administrator for the death of an infant two and a half years old. *Davis v. Seaboard Air Line Ry.* (N. Car.), 163.

DEATH OF PARENT.

See DEATH BY WRONGFUL ACT.

DEBITS.

See TAXATION.

DECISIONS OF INTERMEDIATE COURTS.

See NEGLIGENCE.

DECLARATION OF INTENTION TO INCORPORATE.

See EMINENT DOMAIN.

DECLARATIONS AFTER ACCIDENT.

See EVIDENCE.

DECLARATIONS OF AGENTS.

See CARRIERS OF LIVE STOCK.

DECLARATIONS OF DECEASED'S DRIVER.

See EVIDENCE.

DECLARATIONS OF EMPLOYEES.

See TRESPASSERS.

DEDICATION OF CROSSING.

See CROSSINGS.

DEDUCTIONS.

See TAXATION.

DEEDS.

See RIGHT OF WAY.

DEFECTIVE APPLIANCES.

See MASTER AND SERVANT.

DEFECTIVE CARS.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS.

DEFECTIVE STREET CAR.

See MASTER AND SERVANT.

DEFECTS.

See MASTER AND SERVANT; STATIONS AND DEPOTS.

DEFENSES.

See MASTER AND SERVANT.

DEFINITION OF EXTRAORDINARY DILIGENCE.

See CARRIERS OF PASSENGERS.

DEFINITION OF "RAILROAD."

See TAXATION.

DEFINITION OF REBILLING RATE.

See CONNECTING CARRIERS.

DEFINITIONS.

See NEGLIGENCE.

DEGREE OF CARE.

See CONTRIBUTORY NEGLIGENCE; FIRES SET BY LOCOMOTIVES; LICENSEES; MASTER AND SERVANT; STOCK, INJURIES TO; TICKETS AND FARES; TRESPASSERS.

DEGREE OF CARE REQUIRED FOR SELFPROTECTION.

See CONTRIBUTORY NEGLIGENCE; STREET RAILWAYS.

DEGREE OF CARE REQUIRED OF MASTER.

See MASTER AND SERVANT.

DEGREE OF CARE REQUIRED OF PASSENGER.

See CARRIERS OF PASSENGERS.

DELAY.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; TICKETS AND FARES.

DELAY IN DELIVERING TICKET TO PASSENGER.

See TICKETS AND FARES.

DELIVERY OF PARCELS.

See EXPRESS COMPANIES.

DELIVERY TO CARRIER.

See CARRIERS OF LIVE STOCK.

DELIVERY TO CARRIER BY WRONGDOER.

See CARRIERS OF GOODS.

DEMONSTRATIVE EVIDENCE.

See PERSONAL INJURIES.

See FELLOW SERVANTS.

DEPOT ON ADJOINING LAND.

See EMINENT DOMAIN.

DEPOTS.

See STATIONS AND DEPOTS.

DESIGNATING NEGLIGENT EMPLOYEES.

See NEGLIGENCE.

DESTINATION.

See CARRIERS OF PASSENGERS.

DETECTIVES.

See AGENCY.

DIFFERENT DEPARTMENT LIMITATION.

See FELLOW SERVANTS.

DIFFERENT DEPARTMENTS.

See MASTER AND SERVANT.

DILIGENCE.

See NEGLIGENCE.

DIRECTED TO WRONG CAR.

See CARRIERS OF PASSENGERS; WITNESSES.

DIRECTION OF VERDICT.

See ACCIDENTS ON TRACK.

DIRECTION OF TRAINMEN.

See CARRIERS OF PASSENGERS.

DISCOMFORT.

See EMINENT DOMAIN.

DISCOVERED PERIL.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; NEGLIGENCE.

DISCRIMINATION.

See COMMON CARRIERS; CONNECTING CARRIERS; INJUNCTIONS; TAXATION.

DISEASED LIVE STOCK.

See CARRIERS OF LIVE STOCK.

DISTANCE WITHIN WHICH TRAIN MAY BE STOPPED.

See ACCIDENTS ON TRACK.

DOCTORS.

See PERSONAL INJURIES.

DOUBLE TAXATION.

See TAXATION.

DREAMS.

See PERSONAL INJURIES.

"DRIVER" OF PUBLIC CONVEYANCE.

See DEATH BY WRONGFUL ACT.

DRIVER'S NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

DRIVING ACCIDENTS.

See CROSSINGS; STREET RAILWAYS.

DRUNKENNESS.

See CARRIERS OF PASSENGERS.

DUE CARE.

See FIRES SET BY LOCOMOTIVES.

DUE PROCESS OF LAW.

See EXPRESS COMPANIES; TAXATION.

DUMPING GROUNDS.

See CHILDREN.

DUTY TO KEEP OPEN.

See STATIONS AND DEPOTS.

DUTY TO KEEP WAITING ROOM OPEN.

See STATIONS AND DEPOTS.

DUTY TO MINIMIZE DAMAGES.

See CARRIERS OF PASSENGERS.

DUTY TO WARN PASSENGERS.

See CARRIERS OF PASSENGERS.

EARNING CAPACITY.

See PERSONAL INJURIES; TAXATION.

EASEMENTS.

See RIGHT OF WAY.

EDUCATION.

See DEATH BY WRONGFUL ACT.

EJECTION.

See CARRIERS OF PASSENGERS; TICKETS AND FARES;
TRESPASSER.

ELECTION OF REMEDY.

See COMMON CARRIERS; MASTER AND SERVANT.

ELECTRICITY.

See LICENSEES.

ELECTRIC SHOCKS.

See MASTER AND SERVANT.

ELEMENTS OF DAMAGES.

See BAGGAGE; DEATH BY WRONGFUL ACT; EMINENT
DOMAIN; NUISANCES; PERSONAL INJURIES.

ELEVATOR ON ADJOINING LAND.

See EMINENT DOMAIN.

EMERGENCIES.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEG-
LIGENCE; MASTER AND SERVANT.

EMINENT DOMAIN.

See NUISANCES; RAILROADS.

Court cannot deny right to condemn on the ground that exercise of the power is unnecessary or inexpedient. *Pittsburg, etc., Ry. Co. v. Sanitary Dist. of Chicago (Ill.)*, 813.

Court must presume in condemnation proceedings by railroad that it, in building its line to a point originally fixed upon as a terminus, is acting for the purpose of serving the public. *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.)*, 820.

Damages.

Blasting operations in constructing railroad, occupants of adjoining property could not recover for mere loss of sleep, discomfort, and inconvenience not resulting in physical injury or impairment of health. *Gossett v. Southern Ry. Co. (Tenn.)*, 706.

Noise from blasting in constructing road, right of owner of adjoining property to recover for annoyance and other incidental injuries. *Gossett v. Southern Ry. Co. (Tenn.)*, 706.

No sufficient reason appeared for reversing the judgment refusing to grant injunction to prevent a certain railroad from condemning certain railroad property of another company. *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co. (Ga.)*, 680.

Property acquired and held by railroad company in anticipation of future needs, right of another company to condemn for railroad purposes. *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co. (Ga.)*, 680.

Property which will be needed by a company for railroad purposes in the future, right of another railroad to condemn. *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co. (Ga.)*, 680.

Railroad's power to construct its road is a mere privilege, which does not exempt it from liability for injuries to adjoining property, whether resulting from negligence or otherwise. *Gossett v. Southern Ry. Co. (Tenn.)*, 706.

Right of railroad to condemn property of another railroad company. *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co. (Ga.)*, 680.

Sanitary district, under Ill. Laws 1889, p. 128, § 8, has power to condemn land which is used by a railroad as a freight terminal. *Pittsburgh, etc., Ry. Co. v. Sanitary Dist. of Chicago (Ill.)*, 813.

Scope of judicial inquiry as to power to exercise right of eminent domain in a particular instance. *Pittsburgh, etc., Ry. Co. v. Sanitary Dist. of Chicago (Ill.)*, 813.

That certificate of incorporation of railroad does not contain the names of incorporators who signed declaration of intention to form corporation cannot be urged to defeat condemnation proceedings, although Ala. Code 1896, § 1163, empowers railroad to condemn land "when duly organized." *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.)*, 820.

Where petition for condemnation of land is defective in not stating the purpose of the taking or the manner in which the land is to be used, the proper method of taking advantage of the defect is by demurrer. *Pittsburg, etc., Ry. Co. v. Sanitary Dist. of Chicago (Ill.)*, 813.

Where railroad is seeking to condemn right of way through defendant's farm, the fact that it intends to build a depot and elevator on land adjoining the farm is not a special benefit, where deed conveying the land for the depot was made by a third party and could not be enforced by the landowner. *Illinois, I. & M. Ry. Co. v. Borms (Ill.)*, 823.

Where railroad projects an extension as a continuance of its main line from one point in its terminal city to another point in such city, it is not necessary that it should own property at the latter point for it to make its terminus there and condemn land in that vicinity. *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.)*, 820.

EMPLOYEES.

See AGENCY; FIRES SET BY LOCOMOTIVES; LICENSEES; MASTER AND SERVANT.

EMPLOYEES OF CONTRACTORS.

See LICENSEES.

EMPLOYEES OF DIFFERENT COMPANIES.

See FELLOW SERVANTS.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS; NEGLIGENCE.

Complaint, under employers' liability act of Indiana, in alleging that injured engineer had been in the employ of defendant continuously for twenty-seven years, did not show any such definite agreement with the parties for the future at the time such act went into effect, as would warrant the claim that the contract of employment had been impaired thereby. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser (Ind.)*, 176.

Contributory Negligence.

Complaint under employers' liability act of Indiana need not allege that plaintiff was in the exercise of due care. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser (Ind.)*, 176.

Under certain statutes of Florida, making railroad liable for negligence of fellow servant, in certain cases, any negligence of the injured employee, however slight that contributes in an appreciable degree to the cause of the injury, defeats recovery. *Atlantic Coast Line R. Co. v. Ryland (Fla.)*, 834.

Where conductor violated train dispatcher's order, and thereby caused death of fireman of another train, such conductor was not then "acting as superintendent in the absence of the railroad company's superintendent," within Laws N. Y. 1902, p. 1749. *Crosby v. Lehigh Valley R. Co. (C. C. A.)*, 426.

Where servant was injured by fall of certain bales of cotton which were alleged to have been negligently piled, such bales did not constitute part of master's "ways, works, or machinery." *Cahill v. Boston & M. R. R. (Mass.)*, 830.

EMPLOYMENT CONTRACT.

See EMPLOYERS' LIABILITY ACTS.

ENFORCEMENT OF CONTRACT AGAINST PUBLIC POLICY OF STATE REMOVED FROM.

See CARRIERS OF LIVE STOCK.

ENFORCEMENT OF PERFORMANCE OF DUTIES.

See COMMON CARRIERS.

ENFORCEMENT OF RULES.

See TICKETS AND FARES.

ENGINEERING QUESTIONS.

See NEGLIGENCE.

ENGINEERS.

See TRESPASSERS.

ERROR OF JUDGMENT CAUSED BY DANGER.

See MASTER AND SERVANT.

ESTABLISHMENT OF TERMINUS.

See EMINENT DOMAIN; RAILROADS.

ESTOPPEL.

See CARRIERS OF PASSENGERS; RIGHT OF WAY.

EVIDENCE.

See ACCIDENTS ON TRACK; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; PERSONAL INJURIES; RIGHT OF WAY; STOCK, INJURIES TO; TAXATION; TRESPASSERS; TRIAL; WITNESSES.

Admissions by negligent engineer, made some time after the accident, are admissible against him in, an action against him and his company for his negligence. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.

Admissions of negligent engineer, duty to instruct, in action against him and his company for negligence, that they may be considered only against the engineer. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.

Expert Testimony.

Admissibility. *Meehan v. Great Northern Ry. Co.* (N. Dak.), 34. Question asked of witness with reference to headlight on engine: "That headlight—was that a regulation or another kind?" was objectionable, as leading. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.

Res Gestæ.

Admissions made by negligent engineer, long after the accident, is not part of the *res gestæ*, in action against master for injuries to mail clerk. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.

Declarations made at scene of accident, and within three minutes after its occurrence, by person who was driving plaintiff's decedent, to the effect that deceased had advised him to attempt to cross ahead of the train, were admissible, although declarant was at the time badly hurt and seemed not to be in his right mind. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.

Weather temperature, whether impressions of witness admissible. *Peterson v. Chicago M. & St. P. Ry. Co.* (S. Dak.), 48.

Where pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, and he immediately went into the depot, and told the telegraph operator, his statements in reply to the pedestrian were not admissible as *res gestæ* in an action against the railroad. *Tiborsky v. Chicago, M. & St. P. Ry. Co.* (Wis.), 131.

Where witness testified to facts showing that he did not see the engine in question or the headlight thereon, it was not reversible error for the court to strike his statement that the headlight was smaller than regulation size. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.

EXAMINATION OF FREIGHT.

See COMMON CARRIERS.

EXAMINATION OF PLAINTIFF'S PERSON.

See PERSONAL INJURIES.

EXCESSIVE SPEED.

See CROSSINGS; MASTER AND SERVANT.

EXCESSIVE USE.

See RIGHT OF WAY.

EXCESSIVE VERDICT.

See DAMAGES; DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

EXCURSION TICKETS.

See TICKETS AND FARES.

EXEMPLARY DAMAGES.

See CARRIERS OF PASSENGERS.

EXEMPTION FROM LIABILITY.

See CARRIERS OF PASSENGERS.

EXEMPTION FROM TAXATION.

See LOGGING RAILROADS; TAXATION.

EXERCISE OF DUE CARE IN CONSTRUCTING AND OPERATING.

See EMINENT DOMAIN.

EXISTENCE OF RELATION.

See MASTER AND SERVANT.

EXPECTANCY OF LIFE.

See PERSONAL INJURIES.

EXPEDIENCY.

See EMINENT DOMAIN.

EXPENDITURES.

See TAXATION.

EXPENSES.

See COMMON CARRIERS.

EXPERT TESTIMONY.

See EVIDENCE; TAXATION.

EXPIRATION OF TICKET.

See TICKETS AND FARES.

EXPLOSIONS.

See CARRIERS OF PASSENGERS; PERSONAL INJURIES.

EX POST FACTO LAWS.

See MONOPOLIES.

EXPOSURE TO KNOWN DANGER.

See CONTRIBUTORY NEGLIGENCE.

EXPOSURE TO WEATHER.

See COMMON CARRIERS.

EXPRESS COMPANIES.

See MONOPOLIES.

Burns' Ann. St. 1901, § 3312a, not complied with by a personal delivery of parcel to consignee at local express office. *United States Exp. Co. v. State (Ind.)*, 73.

Burns' Ann. St. 1901, § 3312a, requiring delivery of parcels, not invalid as an attempt to regulate interstate commerce. *United States Exp. Co. v. State (Ind.)*, 73.

Constitutionality of Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver parcels to the consignees in cities

EXPRESS COMPANIES.—Continued.

having a specified population. *United States Exp. Co. v. State (Ind.)*, 73.

Delivery of parcels, Burns' Ann. St. 1901, § 3312a, applicable to all concerns carrying parcels by express; and there was not variance in alleging a carrier to be a corporation, though proof showed it to be a copartnership. *United States Exp. Co. v. State (Ind.)*, 73.

Though a carrier by express is not organized as a corporation, it is subject to legislative control. *United States Exp. Co. v. State (Ind.)*, 73.

EXPULSION OF PASSENGERS.

See CARRIERS OF PASSENGERS; TICKET AND FARES.

EXTENDING PERSON BEYOND CAR LINE.

See CARRIERS OF PASSENGERS.

EXTENSIONS.

See EMINENT DOMAIN; RAILROADS.

EXTRA FARE.

See TICKETS AND FARES.

EXTRAORDINARY DILIGENCE.

See CARRIERS OF PASSENGERS; NEGLIGENCE.

EXTRATERRITORIAL EFFECT OF STATUTES.

See DEATH BY WRONGFUL ACT.

FACILITIES FOR PROCURING TICKETS.

See TICKETS AND FARES.

FAILURE OF OTHER PASSENGERS TO COMPLAIN OR SUE.

See CARRIERS OF PASSENGERS.

FAILURE TO AWAKE PASSENGER.

See CARRIERS OF PASSENGERS.

FAILURE TO FURNISH ICE.

See COMMON CARRIERS.

FAILURE TO PROCURE TICKET.

See TICKETS AND FARES.

FAILURE TO STOP VEHICLE.

See CROSSINGS.

FALL INTO DITCH.

See CARRIERS OF PASSENGERS.

FALSE IMPRISONMENT.

See AGENCY.

FALSE REPRESENTATIONS.

See RIGHT OF WAY.

FARES.

See STREET RAILWAYS; TICKETS AND FARES.

FATHER'S NEGLIGENCE.

See CHILDREN.

FEAR.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT.

FEDERAL JURISDICTION.

See CARRIERS OF LIVE STOCK.

Where petition states joint cause of action for injuries against a nonresident railroad and its resident engineer, the case is not removable to federal court. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Complaint, in action by engineer for injuries received by being struck by mail car while it was being run backward in defendant's yards without proper signals being given, drawn on the theory of a common-law liability, is defective for failing to allege that the person who caused mail car to be moved was not a fellow servant of plaintiff. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.

Complaint, which alleged that fireman's death was caused "by the negligence and carelessness of the agents and servants of defendant," and "by reason of such negligence and carelessness of defendant," sufficiently excluded the idea that the death was caused by the negligence of fellow servants of decedent. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.

Fireman of passenger engine and conductor of another passenger train. *Crosby v. Lehigh Valley R. Co.* (C. C. A.), 426.

Flagman at intersection of several railroads, a portion of whose wages were paid by the other companies, was not fellow servant of their employees. *Louisville & N. R. Co. v. Martin* (Tenn.), 413.

Flagman not fellow servant of trainmen transferring cars along main track outside switching yards; being in a different department of service. *Louisville & N. R. Co. v. Martin* (Tenn.), 413.

Foreman of machine shop, in sending helper to operator, put him under direction of operator, and they were not fellow servants, under Tex. Rev. St. 1895, art. 4560, § 4560g. *Sherman v. Texas & N. O. R. Co.* (Tex.), 637.

Foreman of water supply division of railroad and engineer of detached engine are not fellow servants. *Stuber v. Louisville & N. R. Co.* (Tenn.), 405.

If an injury to a servant was caused by the negligence of a fellow servant, yet the negligence of a vice principal contributed to the injury, the master is liable. *Chicago Union Traction Co. v. Sawusch* (Ill.), 856.

Servant may recover of his master for injuries resulting from master's negligence co-operating with that of a fellow servant. *Gordon v. Chicago, etc., Ry. Co.* (Iowa), 646.

Student brakeman, on defendants' freight trains, for the purpose of learning the work, was fellow servant of other trainmen, although he was receiving no pecuniary compensation. *Weisser v. Southern Pac. Ry. Co.* (Cal.), 861.

Train dispatcher, and conductor of the train, are not fellow servants with fireman on the train, under Sand. & H. Dig. § 6248; *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.

Where a train properly made up at the starting point was afterwards changed by the conductor, a fellow servant, without authority, and in violation of the company's rules, the company was not responsible for his negligence in making up the train. *Driver's Adm'r v. Southern Ry. Co.* (Va.), 11.

Yard foreman not fellow servant of switchman. *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 842.

FENCES.

See RIGHT OF WAY; STOCK, INJURIES TO; CARRIERS OF LIVE STOCK.

FINANCIAL CIRCUMSTANCES.

See TRIAL.

FIRE.

See COMMON CARRIERS.

FIREMAN.

See FELLOW SERVANTS; TRESPASSERS.

FIRE SET BY LOCOMOTIVES.

Combustibles, duty to keep right of way clear of. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 482.

Evidence.

Admissibility of evidence tending to show that on the day, and near the time of the alleged burning of plaintiff's property, the same engine emitted sparks and cinders which started fires. *Hendricks v. Southern Ry. Co. (Ga.)*, 503.

Insufficiency of evidence that fire originated on right of way. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 482.

In view of proximity of property to track, weather conditions, and other circumstances, where it was not shown that the speed adopted was a necessity to the railway service, the question whether defendant was guilty of actionable negligence was for jury. *Norfolk & W. Ry. Co. v. Fritts (Va.)*, 246.

Origin of fire was question for jury. *Southern Ry. Co. v. Johnson (Ala.)*, 162.

Presumption of negligence. *Southern Ry. Co. v. Johnson (Ala.)*, 162.

Presumption of negligence rendered it error to grant nonsuit. *South Georgia Ry. Co. v. Ryals (Ga.)*, 517.

Presumption of negligence throwing burden on defendant to prove that it used best spark arresters in known practical use and exercised reasonable care in selecting competent employees and in operating train. *Norfolk & W. Ry. Co. v. Fritts (Va.)*, 246.

Speed of train, circumstances to be considered in regulating. *Norfolk & W. Ry. Co. v. Fritts (Va.)*, 246.

Speed, whether high rate of may be negligent. *Norfolk & W. Ry. Co. v. Fritts (Va.)*, 246.

That a fire started from a spark from a locomotive does not justify the inference that the fire originated on railroad right of way. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 482.

Verdict for plaintiff for smaller sum should have been allowed to stand, and grant of second new trial was error. *Hendricks v. Southern Ry. Co. (Ga.)*, 503.

Where railroad equips its engines with best known sparks arresters, keeps engines in good repair, and keeps its right of way clear of combustibles, it is, as a general rule, not liable for fires caused by sparks from its locomotives. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 482.

FIXED VALUE.

See COMMON CARRIERS.

FLAGMEN.

See ACCIDENTS ON TRACK.

FLAGMAN AT INTERSECTION.

See FELLOW SERVANTS.

FEAR.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT.

FEDERAL JURISDICTION.

See CARRIERS OF LIVE STOCK.

Where petition states joint cause of action for injuries against a nonresident railroad and its resident engineer, the case is not removable to federal court. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Complaint, in action by engineer for injuries received by being struck by mail car while it was being run backward in defendant's yards without proper signals being given, drawn on the theory of a common-law liability, is defective for failing to allege that the person who caused mail car to be moved was not a fellow servant of plaintiff. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.

Complaint, which alleged that fireman's death was caused "by the negligence and carelessness of the agents and servants of defendant," and "by reason of such negligence and carelessness of defendant," sufficiently excluded the idea that the death was caused by the negligence of fellow servants of decedent. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.

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Yard foreman not fellow servant of switchman. *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 842.

See RIGHT OF WAY; STOCK, INJURIES TO; CARRIERS OF LIVE STOCK.

FINANCIAL CIRCUMSTANCES.

See TRIAL.

FIRE.

See COMMON CARRIERS.

FIREMAN.

See FELLOW SERVANTS; TRESPASSERS.

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Hendricks v. Southern Ry. Co. (Ga.), 503.

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Speed, whether high rate of may be negligent. *Norfolk & W. Ry. Co. v. Fritts (Va.)*, 246.

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FIXED VALUE.

See COMMON CARRIERS.

FLAGMEN.

See ACCIDENTS ON TRACK.

FLAGMAN AT INTERSECTION.

See FELLOW SERVANTS.

FOREIGN CARS.

See ATTACHMENT; MASTER AND SERVANT; TAXATION.

FOREMAN.

See FELLOW SERVANTS; MASTER AND SERVANT.

FOREMAN INJURED.

See MASTER AND SERVANT.

FOREMAN'S DUTIES TO HIMSELF.

See MASTER AND SERVANT.

FORFEITURE.

See RIGHT OF WAY.

FORWARDING INSTRUCTIONS.

See TICKETS AND FARES.

FRANCHISES.

See TAXATION.

FRANCHISE TAX.

See TAXATION.

FRAUD.

See TICKETS AND FARES.

FREE PASSES.

See CARRIERS OF PASSENGERS.

FREEZING OF FREIGHT.

See CONNECTING CARRIERS.

FREIGHT.

See CARRIERS; COMMON CARRIERS.

FREIGHT CHARGES.

See COMMON CARRIERS.

FREIGHT TERMINALS.

See EMINENT DOMAIN.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

FREQUENCY OF USE OF TRACK BY PEDESTRIANS.

See ACCIDENTS ON TRACK.

FRIGHT.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE.

FUTURE NEEDS.

See EMINENT DOMAIN.

GARNISHMENT.

See LEASES AND RUNNING POWERS.

Railroad which, under an agreement between itself and other railroads, formed part of a connecting line, was not liable as trustee in attachment against one of such roads for a sum found by it to be due such road, and for which it was in turn liable to the other roads under the agreement. *Cox v. Central Vermont R. Co.* (Mass.), 432.

GATE.

See CROSSINGS.

GRATUITIOUS SERVICES.

See FELLOW SERVANTS.

GRIEF.

See DEATH BY WRONGFUL ACT.

GROSS RECEIPTS.

See TAXATION.

GUARANTY OF CONNECTIONS WITH TRAINS OF OTHER LINES.

See CARRIERS OF PASSENGERS.

GUESTS.

See CONTRIBUTORY NEGLIGENCE.

HABITS OF DECEASED.

See DEATH BY WRONGFUL ACT.

HABITUAL NEGLIGENCE.

See MASTER AND SERVANT.

HAND CARS.

See MASTER AND SERVANT.

HEADLIGHTS.

See EVIDENCE.

HEALTH.

See CARRIERS OF PASSENGERS; EMINENT DOMAIN.

HEARSAY.

See EVIDENCE; PERSONAL INJURIES.

HIGHWAYS.

See NUISANCES; PERSONAL INJURIES.

HIRED VEHICLES.

See NEGLIGENCE.

"HOOKING FIRE."

See CROSSINGS.

HUSBAND AND WIFE.

See ACTIONS; COMMON CARRIERS; DAMAGES; PERSONAL INJURIES.

ICE FOR CAR.

See COMMON CARRIERS.

IGNORANCE OF STIPULATIONS.

See COMMON CARRIERS.

ILL WILL.

See CARRIERS OF PASSENGERS.

IMMINENT DANGER.

See NEGLIGENCE.

IMMINENT PERIL.

See MASTER AND SERVANT.

IMPAIRING OBLIGATION OF CONTRACT.

See MONOPOLIES.

IMPAIRMENT OF CONTRACT OBLIGATIONS.

See EMPLOYERS' LIABILITY ACTS.

IMPEACHMENT OF WITNESS.

See PERSONAL INJURIES.

IMPLIED DEDICATION OF CROSSING.

See CROSSINGS.

IMPUTED NEGLIGENCE.

See CROSSINGS; NEGLIGENCE; STREET RAILWAYS.

INCIDENTAL INJURIES.

See EMINENT DOMAIN.

INCOME.

See TAXATION.

INCONSISTENT COUNTS.

See TRESPASSERS.

INCONSISTENT GROUNDS OF ACTION.

See CARRIERS OF PASSENGERS.

INCONSISTENT THEORIES.

See CARRIERS OF PASSENGERS.

INCONVENIENCE.

See EMINENT DOMAIN.

INCORPORATION.

See EMINENT DOMAIN; RAILROADS.

INDEBTEDNESS.

See TAXATION.

INDEMNITY.

See MASTER AND SERVANT.

INDEPENDENT CONTRACTORS.

Joint liability for railroad and contractors for injuries to adjoining property from lasting operations. *Gossett v. Southern Ry. Co.* (Tenn.), 706.

INEXPEDIENCY.

See EMINENT DOMAIN.

INEXPERIENCED SERVANTS.

See MASTER AND SERVANT.

INFANTS.

See CHILDREN; DEATH BY WRONGFUL ACT.

INFECTED LIVE STOCK.

See CARRIERS OF LIVE STOCK.

INFECTED YARDS.

See CARRIERS OF LIVE STOCK.

INFERENCE FROM ABSENCE OF CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT.

INFERENCES.

See FIRES SET BY LOCOMOTIVES.

INITIAL CARRIERS.

See CONNECTING CARRIERS; TICKETS AND FARES.

INITIAL CARRIER'S AUTHORITY TO CONTRACT FOR THROUGH SHIPMENT.

See CONNECTING CARRIERS.

INJUNCTIONS.

See EMINENT DOMAIN; NUISANCES.

Where a bill for an injunction alleged the discontinuance by respondent of its car service to complainants while continuing it for the benefit of others, an answer alleging that the discontinuance was caused by complainant's refusal to pay a debt due respondent, set up new matter, which could not be considered on the hearing of a motion to dissolve the temporary injunction. *W. C. Agee & Co. v. Louisville & N. R. Co. (Ala.)*, 129.

INJURIES FROM CONSTRUCTION.

See INDEPENDENT CONTRACTORS.

INJURIES TO PROPERTY.

See EMINENT DOMAIN; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; NUISANCES.

INJURIES TO USE.

See EMINENT DOMAIN; NUISANCES.

INSPECTION.

See MASTER AND SERVANT.

INSPECTION, DEGREE OF CARE REQUIRED.

See MASTER AND SERVANT.

INSPECTION FOR SELFPROTECTION.

See MASTER AND SERVANT.

INSPECTION OF FOREIGN CARS AND APPLIANCES.

See MASTER AND SERVANT.

INSPECTION RECORD.

See MASTER AND SERVANT.

INSTRUCTION.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; EVIDENCE; NEGLIGENCE.

INSULATION OF ELECTRIC WIRES.

See LICENSEES.

INTENDING PASSENGERS.

See CARRIERS OF PASSENGERS.

INTENTIONAL INJURY.

See NEGLIGENCE.

INTENTION TO ABANDON.

See RIGHT OF WAY.

INTEREST IN LAND.

See TAXATION.

INTERSECTING LINES.

See STREET RAILWAYS.

INTERSECTIONS.

See FELLOW SERVANTS.

INTERSTATE COMMERCE.

See CARRIERS OF LIVE STOCK; EXPRESS COMPANIES.

INTERVENING TRACKS.

See CARRIERS OF PASSENGERS.

INTOXICANTS.

See COMMON CARRIERS.

INTOXICATION.

See CARRIERS OF PASSENGERS; PERSONAL INJURIES.

INTOXICATION OF PASSENGER.

See CARRIERS OF PASSENGERS.

INVITATION TO CROSS.

See CROSSINGS.

JERKS AND JARS.

See CARRIERS OF PASSENGERS.

JERKS AND JOLTS.

See CARRIERS OF PASSENGERS.

JOINDER.

See FEDERAL JURISDICTION.

JOINDER OF CAUSES.

See ACTIONS.

JOINDER OF CAUSES OF ACTION.

See DAMAGES.

JOINDER OF MASTER AND SERVANT.

See NEGLIGENCE.

JOINDER OF PARTIES.

See PERSONAL INJURIES.

JOINT LIABILITY.

See INDEPENDENT CONTRACTORS; NEGLIGENCE.

JUDICIAL NOTICE.

See CARRIERS OF LIVE STOCK; RAILROADS.

JUDICIAL POWERS.

See EMINENT DOMAIN.

JUDICIAL PRESUMPTIONS.

See EMINENT DOMAIN.

JUMPING FROM CAR TO AVOID DANGER.

See MASTER AND SERVANT.

JURISDICTION.

See FEDERAL JURISDICTION.

JURY'S PROVINCE.

See NEGLIGENCE.

KNOWLEDGE OF CARRIERS.
See CARRIERS OF LIVE STOCK.

KNOWLEDGE OF DANGER.
See MASTER AND SERVANT.

KNOWLEDGE OF DEFECTS.
See CARRIERS OF LIVE STOCK; MASTER AND SERVANT.

KNOWLEDGE OF PLAINTIFF'S PERIL.
See STREET RAILWAYS.

KNOWLEDGE OF SCHEDULE TIME.
See TRESPASSERS.

KNOWLEDGE OF TRAIN'S APPROACH.
See ACCIDENTS ON TRACK.

LAND NOT TAKEN.
See EMINENT DOMAIN.

LANTERNS.
See MASTER AND SERVANT.

LARGER FARE FOR FAILURE TO PROCURE TICKET.
See TICKETS AND FARES.

LAST CLEAR CHANCE.
See CROSSINGS.

LAST CLEAR CHANCE DOCTRINE.
See NEGLIGENCE.

LATENT DEFECTS.
See MASTER AND SERVANT.

LAWFULNESS.
See EMINENT DOMAIN; NUISANCES.

LEADING QUESTIONS.
See EVIDENCE.

LEARNERS.
See FELLOW SERVANTS.

LEASES AND RUNNING POWERS.
See ACCIDENTS ON TRACK; RAILROADS.

Injury to property resulting from defendant allowing another company to use its railroad to grade a branch road, insufficiency of complaint to state cause of action. *Henry v. Nashville C. & St. L. Ry. (Ala.)*, 488.

Lessee railroad, under its contract with lessor, was not acting as trustee in collecting all earning of the road and in the incurring of all debts contracted by it in operating the road. *Cox v. Central Vermont R. Co. (Mass.)*, 432.

Lessee's interest in the cars of lessor was not an ownership, within meaning of Rev. Laws Vt. 1880, § 3353, authorizing attachment. *Cox v. Central Vermont R. Co. (Mass.)*, 432.

Liability for negligence of another company in using defendant's tracks. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Ownership of railroad, proof of was sufficient to support declaration. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

LEASES AND RUNNING POWERS—Continued.

Where declaration alleged that defendant company was in possession of the road and operating it, and plea of not guilty was filed, it was impliedly conceded by the pleadings, that defendant company was a corporation and was operating the road mentioned in the declaration, and that those in charge of trains thereon were its servants. *Chicago & E. I. R. Co. v. Schmitz* (Ill.), 214.

LEGAL CONCLUSIONS.

See NEGLIGENCE; RIGHT OF WAY.

LEGISLATIVE CONTROL.

See EXPRESS COMPANIES.

LICENSEES.

Bare licensee on railroad track, insufficiency of evidence to show that plaintiff was other than. *Williamson v. Southern Ry. Co.* (Va.), 492.

Care due from electric company to employee of one who had contracted to do work in power house, in insulating electric wires, instruction was sufficiently favorable to defendant. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

Care due licensees on railroad tracks. *Williamson v. Southern Ry. Co.* (Va.), 492.

Care due person in railroad yards on lawful business. *Colorado & S. Ry. Co. v. Sonne* (Colo.), 727.

Contributory Negligence.

Degree of care required of licensee for his own protection. *Louisville & N. R. Co. v. Smith* (Ky.), 148.

Person in railroad yard on invitation of railroad is not relieved from exercising reasonable degree of care to avoid injury. *Colorado & S. Ry. Co. v. Sonne* (Colo.), 727.

Servant of one who had contracted to do certain work in power house of electric company had the right to assume that the insulation of wires was sufficient, and was not guilty of contributory negligence. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

Degree of care due licensee, for whose use a car has been placed on a side track, in making up a train, so as to avoid a collision. *Louisville & N. R. Co. v. Smith* (Ky.), 148.

Light on engine, failure to have was not negligence with respect to mere licensee using tracks as foot-path. *Williamson v. Southern Ry. Co.* (Va.), 492.

Where contract between electric company and another required the latter's servants to work in the former's power house, such company was bound to keep wires near where such employees were required to work so insulated and protected as to be safe. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

Where right of way on which plaintiff's decedent was killed was not on or parallel to an adjoining street, but was entirely inclosed to prevent its use by the public, its use by the public in sometimes passing that way did not amount to a license. *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 737.

Where servant of one who had contracted to do certain work in an electric power house was killed by a shock of electricity, caused by an iron pipe, which he was fitting, or by his wrench coming in contact with an insufficiently insulated wire, the want of proper insulation was the proximate cause of his death. *Ryan v. St. Louis Transit Co.* (Mo.), 775.

LICENSES.

See COMMON CARRIERS; TAXATION.

LICENSING CARRIERS.

See COMMON CARRIERS.

LIENS.

See CARRIERS OF GOODS.

LIFE EXPECTANCY.

See PERSONAL INJURIES.

LIFE TABLES.

See PERSONAL INJURIES.

LIGHTS.

See MASTER AND SERVANT; STATIONS AND DEPOTS.

LIMITATION OF ACTIONS.

See CARRIERS OF LIVE STOCK; DEATH BY WRONGFUL ACT.

LIMITING LIABILITY.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS.

LIMITING LIABILITY TO OWN LINE.

See CONNECTING CARRIERS.

LIMITING SPEED OF TRAINS.

See ACCIDENTS ON TRACK.

LIQUOR ORDINANCE.

See COMMON CARRIERS.

LIQUORS.

See COMMON CARRIERS.

LIVERYMAN'S NEGLIGENCE.

See NEGLIGENCE.

LIVE STOCK.

See CARRIERS OF LIVE STOCK.

LOCAL AUTHORITIES.

See TAXATION.

LOCATION.

See STATIONS AND DEPOTS.

LOCATION OF TERMINUS.

See EMINENT DOMAIN; RAILROADS.

LOGGING RAILROADS.

Railroad, though having for its primary and principal function the carrying of logs to a saw mill, was entitled to exemption from taxation as a railroad, under La. Const. a. 230. *Amos Kent Lumber & Brick Co. v. Tax Assessor (La.)*, 446.

LOOKOUT ON CURVE.

See MASTER AND SERVANT.

LOOKOUTS.

See STOCK, INJURIES TO; STREET RAILWAYS; TRESPASERS.

LOSS OF PARENTS' CARE.

See DEATH BY WRONGFUL ACT.

LOSS OF PRESENCE OF MIND.

See CARRIERS OF PASSENGERS.

LOSS OF SELF-POSSESSION.

See CONTRIBUTORY NEGLIGENCE.

LOSS OF TIME.

See PERSONAL INJURIES.

LUMBER COMPANIES.

See LOGGING RAILROADS.

MAKING UP TRAINS.

See FELLOW SERVANTS; MASTER AND SERVANT.

MALICE.

See CARRIERS OF PASSENGERS.

MALTREATMENT OF PASSENGER.

See CARRIERS OF PASSENGERS.

MANDAMUS.

See COMMON CARRIERS.

MARKING.

See COMMON CARRIERS.

MASTER AND SERVANT.

See ACCIDENTS ON TRACK; AGENCY; CONTRIBUTORY NEGLIGENCE; DAMAGES; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FEDERAL JURISDICTION; FELLOW SERVANTS; LEASES AND RUNNING POWERS; NEGLIGENCE; PLEADING; TORTS; TRESPASSERS.

Actionable negligence where hand, while mounting engine, was injured by reason of cars being moved without warning. *Peoples v. North Carolina R. Co. (N. Car.)*, 18.

Assumption of Risk.

Defects in appliances or work place. *Illinois Cent. R. Co. v. Keebler (Ky.)*, 32.

Employee injured by reason of knowingly using defective hand car cannot recover against his master, although he made use of it under order of superior employee. *Atlantic Coast Line R. Co. v. Ryland (Fla.)*, 834.

Employee not connected with work of switching cars in yard did not assume risk of injury from negligent method of switching. *Houston & T. C. R. Co. v. Turner (Tex.)*, 630.

Habitual negligence of master or his representatives. *Houston & T. C. R. Co. v. Turner (Tex.)*, 630.

In action for injuries to employee, received in jumping from car to avoid imminent peril, a plea not alleging that the danger from the supposed defect was either obvious or known to plaintiff was insufficient. *Pierson Lumber Co. v. Hart (Ala.)*, 791.

Inexperienced boy ordered to lift heavy weight. *Sherman v. Texas & N. O. R. Co. (Tex.)*, 637.

Negligence of master. *Meehan v. Great Northern Ry. Co. (N. Dak.)*, 34.

Obedience to order to do dangerous work. *Illinois Cent. R. Co. v. Keebler (Ky.)*, 32.

Obvious dangers incurred in obedience to orders. *Illinois Cent. R. Co. v. Keebler (Ky.)*, 32.

Railroad employee knowingly using defective machinery cannot recover for injuries resulting therefrom. *Atlantic Coast Line R. Co. v. Ryland (Fla.)*, 834.

Section foreman did not assume risk from sending cars on side track at speed greater than customary. *Houston & T. C. R. Co. v. Turner (Tex.)*, 630.

MASTER AND SERVANT—Continued.

- Burden of showing, in action for death of fireman, that the injury was caused by master's negligence is discharged by showing that the injury was caused in a collision of trains brought about by servants of the railroad who were fellow servants of decedent, under circumstances from which a presumption of negligence necessarily arises. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.
- Complaint alleging a violation of an ordinance regulating the running of locomotives and cars, need not allege that, if it had been complied with, plaintiff would not have been injured. *Pittsburg C. C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Complaint alleging that plaintiff was employed as foreman or boss is sufficiently specific as to the character of the employment. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- Complaint was defective for failing to allege that a rule of defendant required the injured employee to be where he was when struck by a car, or for failing to set forth facts which rendered his presence there necessary. *Pittsburg C. C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Complaint, which alleged that car which struck plaintiff should have been furnished with air brake was defective in failing to allege that such appliance was one which it was practicable to operate in the manner suggested, and to have thereby prevented the accident. *Pittsburg C. C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Concurring negligence, doctrine of was not applicable where proximate cause of employee's death by collision between trains was his own failure to comply with the company's rules regarding the placing of danger signals, and the company was negligent, in using an engine in an imperfect condition. *Driver's Adm'r v. Southern Ry. Co.* (Va.), 11.

Contributory Negligence.

- Care required of servant exposed to sudden and unexpected danger. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- Care required of servant for his own protection. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Duty of section master, or assistant section master, in temporary charge of hand car to notice, for his own protection, such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and to decline or cease to use it if it be obviously unsafe. *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 834.
- Failure of commander of hand car to properly inspect it. *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 834.
- Failure of commander of hand car to properly supervise employees under him. *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 834.
- Failure of commander of hand car to see that employee under him operate it properly. *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 834.
- Fireman, killed while standing in gangway of engine, was not guilty of; it not appearing that engineer had ordered him to keep a lookout and he had failed to obey, or that at the time of the accident he was not doing his duty. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.
- Fireman's failure to keep lookout on curve, where it is impossible for engineer to keep efficient lookout, is not as matter of law. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.
- Foreman of hand car, injured by reason of its derailment, demurrer to declaration should have been sustained where it showed the defective condition of the car was obvious and that it was negligently operated by the employees under him. *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 834.
- In action for injuries to an employee received in jumping from car to avoid imminent peril, that the train was running only 10 miles an hour will not authorize the court to say that plaintiff

MASTER AND SERVANT—Continued.

- was not in a position of peril. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- In order for an employee to recover, in an action for his personal injuries, alleged to have been caused by the negligence of his master, a railroad company, it must appear from the evidence that he was not guilty of contributory negligence, and that his injuries were caused by the negligence of the company. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Instruction, in action for death of a train hand, was erroneous as assuming that deceased's failure to keep a lookout for cars was the proximate cause of the accident. *Peoples v. North Carolina R. Co.* (N. Car.), 18.
- Instruction was erroneous because it placed on plaintiff the burden of proving freedom from contributory negligence on the issue of defendant's negligence. *Peoples v. North Carolina R. Co.* (N. Car.), 18.
- Lookouts on trains, Arkansas statute requiring does not impose upon a fireman the duty to keep a lookout for his own protection. *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 665.
- Obedience to order to do dangerous work. *Illinois Cent. R. Co. v. Keebler* (Ky.), 32.
- Of street railway pitman, in unnecessarily touching uninsulated parts in adjusting leads connecting motive power of street car with overhead current, relieves company from liability for his death, although conductor may have been negligent in permitting trolley pole to come in contact with trolley wire. *Looney v. Metropolitan R. Co., etc.* (U. S.), 617.
- Question for jury where trainman, while mounting a shifting engine, was struck by cars which were moved without warning. *Peoples v. North Carolina R. Co.* (N. Car.), 18.
- Right of freight brakeman, injured while coupling air hose between cars pursuant to order of freight conductor or superintendent, to rely on assurance of latter that he would "look out for him." *Edgar v. New York, N. H. & H. R. Co.* (Mass.), 403.
- Scaffold, employee sent to work on it not bound to inspect it for defects. *Louisville & E. R. Co. v. Poulter's Adm'r* (Ky.), 26.
- Switchman's failure to have a lantern, as required by company's rule, of which he had knowledge, was contributory negligence, although yard foreman had not directed him to provide himself with a lantern. *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 842.
- Where an employee was injured in jumping from a car to avoid imminent peril, he need not show, in order to recover, that it was actually necessary for him to jump in order to save himself. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- Court cannot assume, in action for injuries to employee, received in jumping from car to avoid imminent danger, that it was negligence not to have a particular kind of brake. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- Degree of care required of master. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Degree of care required of master in providing and maintaining appliances. *Meehan v. Great Northern Ry. Co.* (N. Dak.), 34.
- Degree of care required to avoid injuring employee. *Houston & T. C. R. Co. v. Turner* (Tex.), 630.
- Duty of railroad to its trainmen to exercise ordinary care in operating trains. *Choctaw O. & G. Ry. Co. v. Doughty* (Ark.), 665.

Evidence.

- In an action against a railroad company for the death of its employee from collision between trains, evidence showing an habitual disregard by employees of a rule requiring the placing of warning signals in case of the stoppage of trains on the track is properly excluded where it is shown that defendant had notice of the violations. *Driver's Adm'r v. Southern Ry. Co.* (Va.), 11.

MASTER AND SERVANT—Continued.

- Record-entry of inspection of freight car, made by employee of company to which it belonged three days after the accident, was inadmissible in action for injury to employee of another company, against the latter. *Wood v. Rio Grande Western Ry. Co. (Utah)*, 20.
- Where a train properly made up at its starting point was changed by the conductor, evidence relating thereto, not tending to show authority to make the change, was properly rejected. *Driver's Adm'r v. Southern Ry. Co. (Va.)*, 11.
- Excessive speed of cars which struck section foreman on switch track, sufficiency of evidence to raise question. *Houston & T. C. R. Co. v. Turner (Tex.)*, 630.
- Foreman of yard's failure to direct injured switchman to provide himself with a lantern was not negligence where latter was aware that it was his duty, under a rule of the company to have a lantern. *Howard v. Chesapeake & O. Ry. Co. (Ky.)*, 842.
- If the defect in a hand car causing injury to a section foreman in temporary charge of it is such as to deceive human judgment, the company as well as the injured foreman, stands excused, and whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer, as well as to his own credit. *Atlantic Coast Line R. Co. v. Ryland (Fla.)*, 834.
- In an action against a railroad company for the death of its employee, defendant is not chargeable with negligence in failing to maintain telegraph offices along its line not more than 10 miles apart, as required by Virginia statute, where such violation could not have contributed to the accident. *Driver's Adm'r v. Southern Ry. Co. (Va.)*, 11.
- Injury to locomotive engineer from running mail car in switch yard without signals, complaint defective for failing to show that it was master's duty to anticipate occurrence. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser (Ind.)*, 176.
- Injury to servant caused by defect in appliances resulting solely from use, liability of master. *Meehan v. Great Northern Ry. Co. (N. Dak.)*, 34.
- Injury to servant from fall of cotton bales in freight house, evidence insufficient to show negligence on part of foreman. *Cahill v. Boston & M. R. R. (Mass.)*, 830.
- Inspection of car, instruction to find for defendant if the duty of inspection was performed with reasonable care before plaintiff was injured was not warranted by evidence. *Wood v. Rio Grande Western Ry. Co. (Utah)*, 20.
- Locomotive engineer struck by mail car running in switch yard without signals, sufficiency of complaint. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser (Ind.)*, 176.
- Negligence causing death of street railway pitman, shocked while adjusting leads, cannot be inferred from presumption of the exercise of due care on part of person killed, although, in absence of leak in insulation no shock could have been received unless deceased had unnecessarily touched uninsulated ends of leads. *Looney v. Metropolitan R. Co., etc. (U. S.)*, 617.
- Negligence in failing to give a train in advance special warning orders of a train following, which was dangerously made up, is not shown where it is not proved to have been the company's duty to notify such trains; and the dangerous make up was not know by it. *Driver's Adm'r v. Southern Ry. Co. (Va.)*, 11.
- Nonassignable duties, providing and maintaining appliances. *Meehan v. Great Northern Ry. Co. (N. Dak.)*, 34.
- Nonassignable duties, providing and maintaining safe machinery and appliances. *Wood v. Rio Grande Western Ry. Co. (Utah)*, 20.
- Nonassignable duties as to safety of foreign machinery and appliances to be used by master's employees. *Wood v. Rio Grande Western Ry. Co. (Utah)*, 20.

MASTER AND SERVANT—Continued.

Release of claim for injuries to employee, failure of consideration, where actual consideration was retention in employment, and servant was discharged on fictitious charges. *Illinois Cent. R. Co. v. Keebler* (Ky.), 32.

Relief Department.

Agreement by railroad employee that he will accept benefits from relief fund in discharge of any claim which might accrue to him against the railroad for damages for personal injuries is valid. *Pennsylvania Co. v. Chapman* (Ill.), 659.

Agreement to accept benefits in discharge of claim against railroad must be construed in connection with the by-laws of relief department. *Pennsylvania Co. v. Chapman* (Ill.), 659.

Failure of railroad to comply with agreement, effect of. *Pennsylvania Co. v. Chapman* (Ill.), 659.

Relief fund agreement was violated by railroad, and injured employee could sue for damages, notwithstanding provision that relief-fund benefits should be accepted in full discharge of his claim. *Pennsylvania Co. v. Chapman* (Ill.), 659.

Where certificate of membership provides that indemnity provided shall be waived or forfeited by action for damages against railroad, the terms of the contract, and not the general rules of law relative to the election of remedies, will determine the consequences of such an election. *Walters v. Chicago B. & Q. R. Co.* (Neb.), 846.

Rule, complaint alleging violation of did not sufficiently show duty neglected. *Pittsburg, C. C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.

Safe place to work, care required of railroad to provide for its employees. *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 665.

Scaffold, sufficiency of evidence of negligence in construction. *Louisville & E. R. Co. v. Poulter's Adm'r* (Ky.), 26.

Scope of employment of freight conductor or superintendent to order freight brakeman to couple air hose between cars, and to assure him that he would "look out for him." *Edgar v. New York, N. H. & H. R. Co.* (Mass.), 403.

Servant injured, while obeying order, by reason of defects in appliances or work place, which employer knew were dangerous, liability. *Illinois Cent. R. Co. v. Keebler* (Ky.), 32.

Street railway liable for injury to servant because of the negligence of another servant in delivering car without a motor handle, or with a handle which does not fit the car, and with which the car cannot be reversed. *Chicago Union Traction Co. v. Sawusch* (Ill.), 856.

Switchman injured in yard, evidence showed that injuries were caused by negligence of yard foreman. *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 842.

Variance, proof that switchman employed in yard was injured by reason of negligence of yard foreman does not authorize recovery, where petition alleged that engineer charged with duty of operating engine in switching was negligent, and that the place of the accident was dark and dangerous. *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 842.

Where, in an action against a railroad company for the death of an employee, the grounds of defense actually relied on were defendant's want of negligence and negligence of decedent and his fellow servants, the court's refusal to require a statement of the ground of defense was not prejudicial to plaintiff. *Driver's Adm'r v. Southern Ry. Co.* (Va.), 11.

Where, in an action for the death of a train hand, the evidence tended to show that decedent was killed while attempting to mount shifting engine, with his back to approaching box cars, which gave no warning of their approach, and which were not

MASTER AND SERVANT—Continued.

manned with a lookout, the question of the railroad's actionable negligence was for the jury. *Peoples v. North Carolina R. Co.* (N. Car.), 18.

MEDICAL TESTIMONY.

See PERSONAL INJURIES; TRIAL.

MENTAL ANGUISH.

See BAGGAGE.

MENTAL SUFFERING.

See DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

MERCHANTS

See COMMON CARRIERS.

MILEAGE BASIS.

See TAXATION.

MINIMIZING DAMAGES.

See CARRIERS OF PASSENGERS.

MINORS.

See CHILDREN; DEATH BY WRONGFUL ACT.

MIS-BILLING.

See COMMON CARRIERS.

MIS-MARKING.

See COMMON CARRIERS.

MITIGATION OF DAMAGES.

See CONTRIBUTORY NEGLIGENCE.

MIXED TRAINS.

See CARRIERS OF PASSENGERS.

MONOPOLIES.

Attorney general may maintain action to recover penalties for violation of the anti-trust act of Texas by railroad and express company, without the consent or permission of the railroad commission. *State v. Missouri, etc., Ry. Co.* (Tex.), 800.

Contract between railroad company and an express company, whereby the latter was given "exclusive privileges," and the former bound itself not to contract with others to do an express business on the road, and agreed that, in case privileges should be accorded others by legislation or judicial proceedings, the express company should have credit for the sums paid by other companies was violative of the anti-trust statute of Texas. *State v. Missouri, etc., Ry. Co.* (Tex.), 800.

In action by state to recover penalties for violation of the anti-trust act of Texas, certain allegation was a sufficient averment that the features of the contract constituting the unlawful combination were carried out after the statute went into effect, at least as against a general demurrer. *State v. Missouri, etc., Ry. Co.* (Tex.), 800.

Sleeping car company's contract to furnish cars for railroad company, validity under Texas Anti-Trust Law. *Ft. Worth & D. C. Ry. Co. v. State* (Tex.), 352.

Sleeping car company's contract to furnish sleeping cars for railroad company did not violate Anti-Trust Law of Texas, by interfering with transportation of passengers. *Ft. Worth & D. C. Ry. Co. v. State* (Tex.), 352.

Texas Acts 1903, p. 119, c. 94. making trusts unlawful, and imposing

MONOPOLIES—Continued.

a penalty for each day the offense is continued, applies to the carrying on of a combination within the statute, though the combination was formed prior to the statute. *State v. Missouri, etc., Ry. Co. (Tex.)*, 800.

Texas Acts 1903, p. 119, c. 94, making trusts unlawful, and imposing a penalty for each day the offense continued, and applying to the carrying on of a trust subsequent to the enactment of the statute, though formed prior to the statute, is not unconstitutional, as impairing obligation of contract. *State v. Missouri, etc., Ry. Co. (Tex.)*, 800.

Texas Acts 1903, p. 119, c. 94, prohibiting trusts, is not rendered inapplicable to contract between an express company and railroad by the existence of prior laws creating railroad commission, and investing it with power to regulate rates charged by railroads and express companies. *State v. Missouri, etc., Ry. Co. (Tex.)*, 800.

MORTALITY TABLES.

See PERSONAL INJURIES.

MORTGAGES.

See TAXATION.

MOTORMEN.

See DEATH BY WRONGFUL ACT; TRESPASSERS.

MOVING CAR.

See CARRIERS OF PASSENGERS.

MUNICIPAL CORPORATIONS.

See TAXATION.

MUNICIPALITIES.

See RAILROADS.

MUTUAL RIGHTS AND DUTIES.

See STREET RAILWAYS.

NAMES OF NEGLIGENT EMPLOYEES.

See NEGLIGENCE.

NEAR TRACK.

See TRESPASSERS.

NECESSITY.

See EMINENT DOMAIN.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; COMMON CARRIERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; LEASES AND RUNNING POWERS; LICENSEES; MASTER AND SERVANT; PERSONAL INJURIES; PLEADING; STATIONS AND DEPOTS; STOCK, INJURIES TO; STREET RAILWAYS; TORTS; TRESPASSERS.

Amendment of petition alleging that defendant had negligently permitted its tracks to become out of repair, rough and uneven, did not state a new cause of action. *Gordon v. Chicago, etc., Ry. Co. (Iowa)*, 646.

Burden of proof where there are two possible causes of the injury, only one of which is chargeable to defendant's negligence. *Meehan v. Great Northern Ry. Co. (N. Dak.)*, 34.

Charge submitting an issue of negligence not raised by the evidence is erroneous. *Behen v. St. Louis Transit Co. (Mo.)*, 103.

NEGLIGENCE—Continued.

- Declaration need not set out names of negligent employees or agents. *South Georgia Ry. Co. v. Ryals* (Ga.), 517.
- Declaration, sufficiency of under Md. Code Pub. Gen. Laws 1904, Art. 75, § 24. *Philadelphia, B. & W. R. Co. v. Allen* (Md.), 581.
- Declaration which sets forth the facts constituting the cause of action, without detailing the evidence of them, is sufficient. *Philadelphia, B. & W. R. Co. v. Allen* (Md.), 581.
- Definition given of ordinary care by the court imposed duty of exercising extraordinary diligence upon defendant. *Georgia Southern & F. Ry. Co. v. Jones* (Ga.), 154.
- Imputed negligence, person riding in buggy not chargeable with negligence of its driver, a hired liveryman, in case of a collision with a train at a crossing. *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 714.
- In action for injuries from alleged negligence of defendant in constructing its railroad, jury may inquire into the construction of the road, though the question involves questions of engineering, etc. *Gordon v. Chicago, etc., Ry. Co.* (Iowa), 646.
- In action for injuries to brakeman from alleged negligence in construction of defendant's railroad and in failing to furnish proper couplings, petition was not objectionable on the ground that it did not show the negligence of defendant to have been proximate cause of the injury. *Gordon v. Chicago, etc., Ry. Co.* (Iowa), 646.
- In action for injuries to employee received in jumping from car to avoid imminent peril, an allegation that plaintiff was placed in a position of peril is sufficient, without giving the particulars causing the peril. *Pierson Lumber Co. v. Hart* (Ala.), 791.
- Instruction was not erroneous with respect to specifying the different items of negligence. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Last clear chance doctrine, when, and when not, applicable. *Green v. Los Angeles Terminal Ry. Co.* (Cal.), 192.
- Legal conclusion. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Negligent engineer and his company jointly liable where mail clerk is injured; and may be sued jointly or severally. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.
- Ordinance regulating movements of locomotives and cars, violation of as negligence per se. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Ordinances regulating running of locomotives and cars, complaint alleging violation of as negligence need not allege that, if it had been complied with, plaintiff would not have been injured. *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Ordinary diligence, definition of was correct. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Pleading. *Louisville & N. R. Co. v. Crominarity* (Miss.), 513; *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser* (Ind.), 176.
- Question for jury. *Atlanta & W. P. R. Co. v. Hudson* (Ga.), 490; *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.
- Question for jury, whose findings, after having been affirmed by the appellate court, would not be disturbed on further appeal to the supreme court. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.
- Requested instruction was objectionable as an expression of opinion that the acts specified would constitute negligence. *Sanders v. Central of Georgia Ry. Co.* (Ga.), 7.
- Speed in violation of ordinance. *Chicago City Ry. Co. v. Shaw* (Ill.), 586.
- Wanton negligence, definition. *Alabama Great Southern R. Co. v. Guest* (Ala.), 759.
- Wantonness in causing injury, and intention to cause injury, instruction as to what constitutes was argumentative. *Alabama Great Southern R. Co. v. Guest* (Ala.), 759.

NEGLIGENCE—Continued.

When error for trial court to instruct as to what ordinary care requires to be done in a particular case. *Atlanta & W. P. R. Co. v. Hudson* (Ga.), 490.

When instructions declaring that certain facts, if found, constitute negligence are proper. *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 168.

Where a petition contains general averments of negligence "as hereinafter more specifically mentioned and described," only such issues are thereby presented as are found in the specific allegations. *Chicago, R. I. & P. Ry. Co. v. Wheeler* (Kan.), 145.

NEGLIGENCE AFTER DISCOVERY OF PASSENGER'S PERIL.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS; CROSSINGS; MASTER AND SERVANT.

NEGLIGENCE IN DELIVERING DEFECTIVE APPLIANCE TO EMPLOYEE.

See MASTER AND SERVANT.

NEGLIGENCE OF ANOTHER COMPANY.

See LEASES AND RUNNING POWERS.

NEGLIGENCE OF EMPLOYEES OF OTHER DEPARTMENTS.

See MASTER AND SERVANT.

NEGLIGENCE OF FATHER.

See CHILDREN.

NEGLIGENCE OF MASTER AND FELLOW SERVANT.

See FELLOW SERVANTS.

NEGLIGENCE OF SUBORDINATES.

See MASTER AND SERVANT.

NEGROES.

See CARRIERS OF PASSENGERS.

NERVOUS SYSTEM.

See PERSONAL INJURIES.

NET INCOME.

See TAXATION.

NEW CAUSE OF ACTION.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; NEGLIGENCE.

NEW MATTER.

See INJUNCTIONS.

NEW TRIAL.

See FIRES SET BY LOCOMOTIVES.

NOISE.

See EMINENT DOMAIN; NUISANCES.

NONASSIGNABLE DUTIES.

See MASTER AND SERVANT.

NONRESIDENCE.

See FEDERAL JURISDICTION.

NOTICE OF CLAIM.

See CARRIERS OF LIVE STOCK.

NOTICE OF DEFENSE.

See CARRIERS OF PASSENGERS.

NUISANCES.

See CARRIERS OF LIVE STOCK; EMINENT DOMAIN; INDEPENDENT CONTRACTORS.

Bill to restrain construction of switch track along county road in front of plaintiff's premises was insufficient to justify an injunction. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

Blasting operations in constructing railroad, whether they amounted to a nuisance with respect to adjoining property, and whether the rental value of the property was affected, was for jury. *Gossett v. Southern Ry. Co. (Tenn.)*, 706.

Complaint, in suit to enjoin construction of railroad switch along county road in front of plaintiff's premises, failed to allege that her injury, if any, was different in kind from that suffered by the general public, and hence she was not entitled to sue to enjoin maintenance of switch. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

Construction of switch along county road in front of plaintiff's premises, evidence was insufficient to justify an injunction. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

Railroad switch or siding is not a nuisance per se, and can only become such by reason of circumstances connected with its construction, or the manner of its use. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

Railroad was not a necessary party defendant to suit to restrain construction of switch, which it had agreed to construct at the expense of a gravel company. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

Verification of answer by officer of gravel company was no objection to it, in suit to restrain construction of switch by railroad company at the expense of the gravel company. *Davis v. Baltimore & O. R. Co. (Md.)*, 699.

NUMBER OF ENGINE.

See TRESPASSERS.

NUMBER OF PERSONS USING TRACK.

See ACCIDENTS ON TRACK.

NUMBER OF TRACKS.

See RIGHT OF WAY.

NUTURE.

See DEATH BY WRONGFUL ACT.

OBEDIENCE TO ORDERS.

See MASTER AND SERVANT.

OBEDIENCE TO RULE.

See MASTER AND SERVANT.

OBSTRUCTED VIEW.

See CROSSINGS.

OBSTRUCTIONS ON RIGHT OF WAY.

See CROSSINGS.

OBVIOUS DANGER.

See MASTER AND SERVANT.

OBVIOUS DEFECTS.

See MASTER AND SERVANT.

OCCUPATION TAX.

See TAXATION.

OFFERS TO PURCHASE.

See TAXATION.

OPEN LOTS.

See CHILDREN.

OPERATION.

See EMINENT DOMAIN.

OPERATION OF RAILROADS.

See NUISANCES.

OPERATIONS.

See PERSONAL INJURIES.

OPERATING EXPENSES.

See TAXATION.

OPINION EVIDENCE.

See CROSSINGS; EVIDENCE; TAXATION.

OPPORTUNITY TO PROCURE TICKET.

See TICKETS AND FARES.

OPTION OF SHIPPER AS TO NATURE OF CONTRACT.

See COMMON CARRIERS.

ORDERED INTO DANGER.

See MASTER AND SERVANT.

ORDERED TO LIFT HEAVY WEIGHT.

See MASTER AND SERVANT.

ORDINANCES.

See COMMON CARRIERS; NEGLIGENCE; STREET RAILWAYS; TAXATION; TRESPASSERS.

ORDINARY DILIGENCE.

See NEGLIGENCE.

ORGANIZATION OF CORPORATION.

See EMINENT DOMAIN.

ORIGIN.

See FIRES SET BY LOCOMOTIVES.

OWNERSHIP.

See RIGHT OF WAY; STOCK, INJURIES TO.

OWNERSHIP OF GOODS.

See CARRIERS OF GOODS.

OWNERSHIP OF LAND AT TERMINAL POINT.

See EMINENT DOMAIN.

OWNERSHIP OF LOCOMOTIVE.

See ACCIDENTS ON TRACK.

OWNERSHIP OF RAILROAD.

See LEASES AND RUNNING POWERS; RAILROADS.

PAIN.

See PERSONAL INJURIES.

PANICS.

See CARRIERS OF PASSENGERS.

PARENT AND CHILD.

See CHILDREN; DEATH BY WRONGFUL ACT.

PARENT'S CARE.

See DEATH BY WRONGFUL ACT.

PARENT'S NEGLIGENCE.

See CHILDREN.

PAROLE EVIDENCE.

See CARRIERS OF LIVE STOCK; TAXATION.

PARTIALITY TO FEDERAL COURT.

See TRIAL.

PARTIES.

See NEGLIGENCE; NUISANCES.

PASSENGERS.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; STATIONS AND DEPOTS; TICKETS AND FARES.

PASSES.

See CARRIERS OF PASSENGERS.

PASSING FROM ONE CAR TO ANOTHER.

See CARRIERS OF PASSENGERS.

PEDESTRIANS.

See ACCIDENTS ON TRACK; CROSSINGS; LICENSEES; PERSONAL INJURIES; STREET RAILWAYS; TRESPASSERS.

PENALTIES.

See MONOPOLIES; STOCK, INJURIES TO.

PERILOUS POSITION.

See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; NEGLIGENCE.

PERSONAL INJURIES.

See ACTIONS; CHILDREN; COMMON LAW; CROSSINGS; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

Damages.

Child bearing power, loss of as element of damages.. Normile v. Wheeling Traction Co. (W. Va.), 235.

Excessive verdict, when verdict will be disturbed. Normile v. Wheeling Traction Co. (W. Va.), 235.

Surgical operation rendered necessary by injuries, evidence to show that it was attended with great difficulty and dangers,

PERSONAL INJURIES—Continued.

and that comparatively few physicians perform such operation inadmissible. *Normile v. Wheeling Traction Co. (W. Va.)*, 235.

Time lost recoverable in action by wife for her personal injuries. *Normile v. Wheeling Traction Co. (W. Va.)*, 235.

Verdict for \$10,000 was not so excessive as to indicate passion, prejudice, or corruption on part of jury. *Yazoo & M. V. R. Co. v. Grant (Miss.)*, 257.

Evidence.

American Mortality Table is competent evidence to prove life expectancy. *Illinois Cent. R. Co. v. Houchins (Ky.)*, 850.

Dream by plaintiff that his hand would have to be amputated, and that he told his wife to put it in ice to preserve it so that his body could all be buried together, was not competent to prove pain or suffering. *Louisville & N. R. Co. v. Smith (Ky.)*, 148.

Expressions of physical or mental suffering as original evidence. *Louisville & N. R. Co. v. Smith (Ky.)*, 148.

Hearsay, testimony as to statement made by a physician to plaintiff that it would be necessary to amputate his hand. *Louisville & N. R. Co. v. Smith (Ky.)*, 148.

Injury to nervous system, admissibility of medical testimony. *Chicago City Ry. Co. v. McCaughna (Ill.)*, 262.

Life expectancy admissible on issue of damages where proof that plaintiff's capacity to earn money is impaired or partially destroyed. *Illinois Cent. R. Co. v. Houchins (Ky.)*, 850.

Life tables, duty of court to instruct as to value and application of. *Illinois Cent. R. Co. v. Houchins (Ky.)*, 850.

Physical examination, district court, in absence of legislation, could not compel plaintiff to submit to. *May v. Northern Pac. Ry. Co. (Mont.)*, 520.

Physician testifying for plaintiff in regard to his injuries cannot be cross-examined with reference to his professional opinions in other personal injury suits. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Physician, who had testified in regard to plaintiff's injuries could not be shown, by direct examination of a witness, to be interested as a medical man in personal injury suits against corporations. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Privileged communications, proper to refuse to permit defendant to examine physician as to plaintiff's condition at the time he attended her. *May v. Northern Pac. Ry. Co. (Mont.)*, 520.

Testimony as to statements detailing his sufferings, made by plaintiff several months after the accident, was incompetent. *Louisville & N. R. Co. v. Smith (Ky.)*, 148.

The court properly instructed the jury not to consider the Carlisle mortality table, which was in evidence, if they should believe that plaintiff was not entitled to recover, or that his injuries were not permanent. *Sanders v. Central of Georgia Ry. Co. (Ga.)*, 7.

Where competent evidence was admitted showing plaintiff's nervous condition, error in permitting a witness to state that he knew, without plaintiff telling him, that she was nervous, and that he knew nothing about it except from her statements, without requiring an explanation of such conflicting statements, was not reversible error. *Chicago City Ry. Co. v. McCaughna (Ill.)*, 262.

Where physician testifies as to an injury to plaintiff's ankle, he may use a skeleton for the purpose of explaining it to the jury. *Chicago & A. R. Co. v. Walker (Ill.)*, 596.

In action by wife for her personal injuries, she may elect whether or not to join her husband as co-plaintiff. *Normile v. Wheeling Traction Co. (W. Va.)*, 235.

PERSONAL INJURIES—Continued.

Railroad is liable for injuries to pedestrian on public highway running parallel with track owing to explosion by train of torpedo placed on track contrary to rules of the company. *Illinois Cent. R. Co. v. Schultz* (Miss.), 786.

Release of cause of action against saloon keeper who sold the liquor did not discharge any right of action against the carrier for injuries sustained by passenger while intoxicated. *Fox v. Michigan Cent. R. Co.* (Mich.), 124.

Where pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, the doctrine of *res ipsa loquitur* was not applicable. *Tiborsky v. Chicago, M. & St. P. Ry. Co.* (Wis.), 131.

Where pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, the question of the railroad's negligence was one for the jury. *Tiborsky v. Chicago, M. & St. P. Ry. Co.* (Wis.), 131.

\$10,500 was an excessive verdict. *Illinois Cent. R. Co. v. Houchins* (Ky.), 850.

PHOTOGRAPHS.

See DEATH BY WRONGFUL ACT.

PHYSICAL EXAMINATION.

See PERSONAL INJURIES.

PHYSICAL INJURIES.

See EMINENT DOMAIN.

PHYSICAL SUFFERING.

See PERSONAL INJURIES.

PHYSICIANS.

See PERSONAL INJURIES.

PLEADING.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CHILDREN; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; EXPRESS COMPANIES; FELLOW SERVANTS; LEASES AND RUNNING POWERS; MASTER AND SERVANT; MONOPOLIES; NEGLIGENCE; NUISANCES; RIGHT OF WAY; STOCK, INJURIES TO; TRESPASSERS.

Plea of general issue was an admission that at the time of the alleged injury to switchman defendant was operating the particular line of road mentioned in the declaration and that the persons in charge of the train were its servants. *Pennsylvania Co. v. Chapman* (Ill.), 659.

Proper remedy for failure of complaint against master for injuries to servant to show the particular acts of the particular agents of the master which constituted the negligence complained of, is by a motion to make specific. *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 665.

PLEADING AND PROOF.

See MASTER AND SERVANT.

POLES NEAR TRACK.

See CARRIERS OF PASSENGERS.

POLICEMEN.

See TRESPASSERS.

POSITION OF PERIL.

See NEGLIGENCE.

POSITION OF SERVANT.

See MASTER AND SERVANT.

POSTMASTER.

See TRESPASSERS.

POVERTY OF PLAINTIFF.

See TRIAL.

POWER HOUSES.

See LICENSEES.

PRACTICE.

See EMINENT DOMAIN; PLEADING.

PREJUDICIAL REMARKS.

See CARRIERS OF PASSENGERS.

PRESENCE OF MIND.

See CARRIERS OF PASSENGERS.

PRESENT USE.

See EMINENT DOMAIN.

PRESUMPTION OF DUE CARE ON PART OF DECEASED.

See DEATH BY WRONGFUL ACT.

PRESUMPTION OF NEGLIGENCE.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; FIRES SET BY LOCOMOTIVES; STOCK, INJURIES TO; STREET RAILWAYS.

PRESUMPTIONS.

See ACCIDENTS ON TRACK; CARRIERS OF LIVE STOCK; COMMON LAW; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; TAXATION.

PRIMA FACIE CASE.

See BAGGAGE; CARRIERS OF PASSENGERS; CROSSINGS.

PRINTED CONDITIONS.

See COMMON CARRIERS.

PRIVATE DETECTIVES.

See AGENCY.

PRIVATE ENTERPRISES.

See SPURS AND SIDETRACKS.

PRIVATE INJURY.

See NUISANCES.

PRIVATE RAILROADS.

See LOGGING RAILROADS; TAXATION.

PRIVATE RIGHTS.

See EMINENT DOMAIN.

PRIVATE TEAMS.

See CONTRIBUTORY NEGLIGENCE.

PRIVILEGED COMMUNICATIONS.

See PERSONAL INJURIES.

PROBABLE CONSEQUENCES.

See LICENSEES.

PROSECUTIONS.

See AGENCY.

PROSPECTIVE PASSENGERS.

See CARRIERS OF PASSENGERS.

PROTRUDING HEAD FROM CAR WINDOW.

See CARRIERS OF PASSENGERS.

PROVINCE OF COURT.

See EMINENT DOMAIN.

PROVINCE OF JURY.

See NEGLIGENCE.

PROXIMATE CAUSE.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CROSSINGS; LICENSEES; MASTER AND SERVANT; NEGLIGENCE.

PROXIMITY OF POLES.

See CARRIERS OF PASSENGERS.

PROXIMITY OF PROPERTY.

See FIRES SET BY LOCOMOTIVES.

PUBLIC ENEMY.

See COMMON CARRIERS.

PUBLIC INTERESTS.

See SPURS AND SIDETRACKS; STATIONS AND DEPOTS.

PUBLIC NUISANCES.

See NUISANCES.

PUBLIC POLICY.

See CARRIERS OF LIVE STOCK.

PUBLIC RAILROADS.

See LOGGING RAILROADS.

PUBLIC SERVICE CORPORATIONS.

See TAXATION.

PUBLIC USE.

See EMINENT DOMAIN.

PUNITIVE DAMAGES.

See CARRIERS OF PASSENGERS; DAMAGES.

PURPOSES OF TAXATION.

See TAXATION.

QUARANTINE.

See CARRIERS OF LIVE STOCK.

QUESTIONS FOR JURY.

See NEGLIGENCE; RAILROADS.

RAILROAD COMMISSIONS.

See COMMON CARRIERS; CONNECTING CARRIERS;
MONOPOLIES.

RAILROAD PROPERTY.

See EMINENT DOMAIN.

RAILROADS.

See CARRIERS; EMINENT DOMAIN; GARNISHMENT;
INDEPENDENT CONTRACTORS; LEASES AND RUN-
NING POWERS; LOGGING RAILROADS; NEGLIGENCE;
NUISANCES; PERSONAL INJURIES; PLEADING;
RIGHT OF WAY; STREET RAILWAYS; TAXATION.

Incorporation of railroad to run from one place "to" another place does not require it to stop at the corporate limits of the latter place, but it may fix its terminus at such location in that place as shall be agreed upon between it and the municipal authorities. *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.)*, 820.

Judicial notice will be taken of a charter granted to a railroad company by the secretary of state, under the general law providing for the incorporation of such companies. *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co. (Ga.)*, 680.

Ownership of railroad, one suing for personal injuries sustained by being struck by a train at street crossing not required to make formal proof of, but evidence of common reputation is sufficient. *Chicago & E. I. R. Co. v. Schmitz (Ill.)*, 214.

Question whether defendant was operating a particular line of railroad at the time of the injury alleged in the declaration is, where the evidence is conflicting, one for jury. *Pennsylvania Co. v. Chapman (Ill.)*, 659.

Right of company to extend line to a proposed point in terminal city as effected by fact that it had built depot at certain point in such city. *Central of Ga. Ry. Co. v. Union Springs, etc., Ry. Co. (Ala.)*, 820.

RAILROADS IN STREETS.

See CROSSINGS.

RATES.

See COMMON CARRIERS; CONNECTING CARRIERS;
MONOPOLIES; STREET RAILWAYS.

REASONABLENESS OF STIPULATION.

See CARRIERS OF LIVE STOCK.

REBILLING RATE.

See CONNECTING CARRIERS.

REBUTTAL.

See ACCIDENTS ON TRACK.

RECEIPTS.

See TAXATION.

RECEIVING PASSENGERS.

See CARRIERS OF PASSENGERS.

RECIPROCAL RIGHTS AND DUTIES.

See STREET RAILWAYS.

RECKLESSNESS.

See CARRIERS OF PASSENGERS.

REFUSAL OF CAR SERVICE.

See COMMON CARRIERS.

REFUSAL TO PAY ADDITIONAL FARE.

See CARRIERS OF PASSENGERS.

REFUSAL TO PAY FARE.

See CARRIERS OF PASSENGERS.

RELATION OF MASTER AND SERVANT.

See LEASES AND RUNNING POWERS.

RELATION OF PARTIES.

See MASTER AND SERVANT.

RELATOR'S SPECIAL INTEREST.

See COMMON CARRIERS.

RELEASE OF CLAIMS.

See MASTER AND SERVANT.

RELIANCE ON DEFENDANT'S PERFORMANCE OF DUTIES.

See LICENSEES.

RELIANCE ON DIRECTION OF TRAINMEN.

See CARRIERS OF PASSENGERS.

RELIEF DEPARTMENT.

See MASTER AND SERVANT.

REMARKS OF COURT.

See TRIAL.

REMEDIES.

See COMMON CARRIERS; PLEADING; STOCK, INJURIES TO.

REMOTE DAMAGES.

See BAGGAGE; COMMON CARRIERS.

REMOVAL OF CAUSE.

See CARRIERS OF LIVE STOCK; FEDERAL JURISDICTION.

RENTAL VALUE.

See NUISANCES.

REPUGNANCY.

See TRESPASSERS.

RESERVOIR.

See TAXATION.

RES GESTÆ.

See CARRIERS OF LIVE STOCK; EVIDENCE; PERSONAL INJURIES; TRESPASSERS.

RES IPSA LOQUITUR.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; MASTER AND SERVANT; PERSONAL INJURIES.

RESTRAINT OF TRADE.

See MONOPOLIES.

RETROACTIVE LAWS.

See MONOPOLIES.

RETROSPECTIVE LAWS.

See MONOPOLIES.

RETURN TICKETS.

See TICKETS AND FARES.

REVENUE MEASURES.

See TAXATION.

REVIEW.

See NEGLIGENCE; PERSONAL INJURIES; TRESPASSERS.

REVIVOR.

See DEATH BY WRONGFUL ACT.

RIDING GRATUITOUSLY.

See CARRIERS OF PASSENGERS.

RIDING ON PLATFORM.

See CARRIERS OF PASSENGERS.

RIDING ON RUNNING BOARD.

See CARRIERS OF PASSENGERS.

RIGHT OF ACTION.

See DEATH BY WRONGFUL ACT; STOCK, INJURIES TO.

RIGHT OF PUBLIC TO USE TRACKS.

See STREET RAILWAYS.

RIGHT OF WAY.

See EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES; LICENSEES; RAILROADS.

Abandonment, intention to abandon must coexist with nonuser. *Stannard v. Aurora, etc., Ry. Co. (Ill.)*, 685.

Adverse possession, whether title to right of way granted by Congress to the Northern Pac. R. Co. for the construction of its road could be acquired by for private use. *Northern Pac. Ry. Co. v. Ely (U. S.)*, 42.

Deed to railroad of a right of way did not convey fee to the strip, but only right to use it perpetually for right of way purposes. *Walker v. Illinois Cent. R. Co. (Ill.)*, 439.

Evidence.

Introduction of title papers by defendant, in action for wrongful death, was not necessary, it appearing that such right of way had been inclosed for more than 45 years. *Louisville & N. R. Co. v. Redmon's Adm'x (Ky.)*, 737.

Fact that railroad represented, when land was deeded to it for a right of way, that it had located its line over such land and would do certain things in the future, and subsequently abandoned the proposed route, is not ground for cancellation of such deed, in absence of anything to show that such representations were false when made. *Stannard v. Aurora, etc., Ry. Co. (Ill.)*, 685.

Immaterial, in action for death of trespasser, that all the fences separating defendant's right of way from the lands of others were not built by it. *Louisville & N. R. Co. v. Redmon's Adm'x (Ky.)*, 737.

Mere allegation that railroad had abandoned its right of way at a certain time is a mere conclusion of the pleader. *Stannard v. Aurora, etc., Ry. Co. (Ill.)*, 685.

RIGHT OF WAY—Continued.

Mere easement acquired by conveyance of right of way for wooden tramway over certain land; and grantee's successors were not authorized to construct steam railway. *Warren & O. V. R. Co. v. Garrison* (Ark.), 41.

Railroad was not so limited in use of strip granted that it could not maintain thereon any tracks in excess of a single or double track railroad, without being held to have placed an additional burden on the fee, entitling owner to compensation. *Walker v. Illinois Cent. R. Co.* (Ill.), 439.

Where owner of land subject to an easement for the construction of a wooden tramway stood by and permitted defendant to construct a steam railroad thereon, she was estopped to maintain ejectment to recover the land, and was restricted to compensation for injuries sustained. *Warren & O. V. R. Co. v. Garrison* (Ark.), 41.

RIGHT TO ENFORCE CONTRACT.

See EMINENT DOMAIN.

RIGHT TO EXERCISE POWER.

See EMINENT DOMAIN.

RIGHT TO OBJECT.

See EMINENT DOMAIN.

RIGHT TO RECOVER FOR EJECTION OF PASSENGER.

See TICKETS AND FARES.

RIGHT TO REPUDIATE.

See COMMON CARRIERS.

ROLLING STOCK.

See ATTACHMENT; LEASE AND RUNNING POWERS; TAXATION.

RULES.

See CARRIERS OF PASSENGERS; FELLOW SERVANTS; MASTER AND SERVANT; TICKETS AND FARES; PERSONAL INJURIES.

RULES OF CARRIER.

See TRIAL.

RUNNING BOARD.

See CARRIERS OF PASSENGERS.

RUNNING POWERS.

See ACCIDENTS ON TRACK.

SAFE PLACE TO WORK.

See CONTRIBUTORY NEGLIGENCE.

SALOON KEEPERS.

See PERSONAL INJURIES.

SANITARY COMMISSION.

See CARRIERS OF LIVE STOCK.

SANITARY DISTRICTS.

See EMINENT DOMAIN.

SAWMILLS.

See SPURS AND SIDETRACKS.

SCAFFOLDS.

See MASTER AND SERVANT

SCHEDULE TIME.

See TRESPASSERS.

SCOPE OF EMPLOYMENT.

See AGENCY; MASTER AND SERVANT; TORTS; TRESPASSERS.

SCREEN FOR WINDOWS.

See CARRIERS OF PASSENGERS.

SECTION FOREMAN.

See MASTER AND SERVANT.

SELECTION OF CONNECTING CARRIER.

See CONNECTING CARRIERS.

SELECTION OF EMPLOYEES.

See FIRES SET BY LOCOMOTIVES.

SELF-POSSESSION.

See CARRIERS OF PASSENGERS.

SELF-POSSESSION IN FACE OF DANGER.

See CONTRIBUTORY NEGLIGENCE.

SELLING INTOXICANTS.

See PERSONAL INJURIES.

SELLING TICKETS.

See TAXATION.

SEPARATE DELAYS.

See CARRIERS OF LIVE STOCK.

SEPARATION OF WHITE AND COLORED PASSENGERS.

See CARRIERS OF PASSENGERS.

SERVANTS.

See MASTER AND SERVANT.

SERVANT'S LIABILITY.

See NEGLIGENCE.

SERVANTS OF ANOTHER COMPANY.

See LICENSEES.

SERVANTS OF CONTRACTORS.

See LICENSEES.

SERVANTS' TORTS.

See TORTS.

SHIPPER'S KNOWLEDGE OF LIMITATION OF INITIAL CARRIER'S AUTHORITY.

See CONNECTING CARRIERS.

SHOOTING TRESPASSERS.

See TRESPASSERS.

SICKNESS FROM RIDING IN SMOKER.

See CARRIERS OF PASSENGERS.

SIDETRACKS.

See SPURS AND SIDETRACKS.

SIDEWALKS.

See PERSONAL INJURIES.

SIDINGS.

See NUISANCES.

SIGNALS.

See CROSSINGS; STREET RAILWAYS; TRESPASSERS.

SINGLE CAUSE OF ACTION.

See DAMAGES.

SKELETONS.

See PERSONAL INJURIES.

SLEEPING CAR COMPANIES.

See MONOPOLIES.

SLEEPING PASSENGERS.

See CARRIERS OF PASSENGERS.

SLEEP LOST.

See EMINENT DOMAIN.

SMALL CHILDREN.

See CARRIERS OF PASSENGERS.

SMOKING CARS

See CARRIERS OF PASSENGERS.

SOCIETY.

See DEATH BY WRONGFUL ACT.

SORROW.

See DEATH BY WRONGFUL ACT.

SPANISH FEVER.

See CARRIERS OF LIVE STOCK.

SPARK ARRESTERS.

See FIRES SET BY LOCOMOTIVES.

SPECIAL BENEFITS.

See EMINENT DOMAIN.

SPECIAL INTEREST OF RELATOR.

See COMMON CARRIERS.

SPECIAL OFFICER.

See TRESPASSERS.

SPECIAL PRIVILEGES.

See MONOPOLIES.

SPECIFYING NEGLIGENT EMPLOYEES.

See NEGLIGENCE.

SPEED.

See CARRIERS OF PASSENGERS; CROSSINGS; FIRES
SET BY LOCOMOTIVES; MASTER AND SERVANT;
STREET RAILWAYS.

SPEED IN VIOLATION OF ORDINANCE.

See ACCIDENTS ON TRACK; CROSSINGS; TRESPASSERS.

SPEED OF STREET CAR.

See STREET RAILWAYS.

SPLENITIC FEVER.

See CARRIERS OF LIVE STOCK.

SPLITTING CAUSE OF ACTION.

See BAGGAGE.

SPURS AND SIDETRACKS.

See COMMON CARRIERS; NUISANCES.

Contract to build spur track from railroad's main line to private enterprise, validity. *Butler v. Tifton, T. & G. Ry. Co. (Ga.)*, 120.

Right to contract to build spur track from railroad's main line to sawmill or other private enterprise not restricted by public interests. *Butler v. Tifton, T. & G. Ry. Co. (Ga.)*, 120.

STARTING CARS.

See CARRIERS OF PASSENGERS.

STARTING TRAINS.

See CARRIERS OF PASSENGERS.

STATE BOARD OF EQUALIZATION.

See TAXATION.

STATEMENTS OF EMPLOYEES.

See CARRIERS OF LIVE STOCK.

STATEMENTS OF INJURED PERSON.

See EVIDENCE.

STATIONS AND DEPOTS.

See PERSONAL INJURIES; RAILROADS.

Duty to keep depot open for accommodation of passengers. *Draper v. Evansville & T. H. R. Co. (Ind.)*, 255.

Duty to keep depot open for accommodation of passengers, complaint did not show violation of Burn's Ann. St. 1901. *Draper v. Evansville & T. H. R. Co. (Ind.)*, 255.

Lights required at station, character of dependent on character and extent of business transacted there. *St. Louis & S. F. R. Co. v. Marshall (Kan.)*, 398.

Negligence of carrier a question for jury where passenger came to depot at night with a ticket, and was admitted to the room by village marshal, who unlocked the door, and was injured by falling through a hole in waiting room, which had been there for a long time. *Chicago & A. R. Co. v. Walker (Ill.)*, 596.

Passenger finding depot locked is not a trespasser in entering it when it is opened and lighted by one not an agent of the carrier. *Chicago & A. R. Co. v. Walker (Ill.)*, 596.

Right of railroad to contract for location and maintenance of stations may be restricted by fact that the public has an interest in the times and places for stoppage of trains. *Butler v. Tifton, T. & G. Ry. Co. (Ga.)*, 120.

Waiting rooms, carrier must furnish suitable ones, and keep them open for all regular trains and for trains which stop on signals. *Chicago & A. R. Co. v. Walker (Ill.)*, 596.

STATUTES.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CROSSINGS; DEATH BY WRONGFUL ACT; EMPLOYEES' LIABILITY ACTS; EXPRESS COMPANIES; FELLOW SERVANTS; MONOPOLIES; STATIONS AND DEPOTS; STOCK, INJURIES TO; TAXATION.

STATUTORY NEGLIGENCE.

See MASTER AND SERVANT.

STATUTORY PRECAUTIONS.

See ACCIDENTS ON TRACKS; MASTER AND SERVANT.

STEALING RIDES.

See TRESPASSERS.

STEAMBOAT LINES.

See TAXATION.

STOCK AND STOCKHOLDERS.

See TAXATION.

STOCK, INJURIES TO.

Cattle guards, penalty the only remedy for violation of Kirby's Dig. §§ 6644, 6645, requiring railroads to construct. *St. Louis, M. & S. E. Ry. Co. v. Busick* (Ark.), 1.

Cattle guards, right of action for injuries from absence of or defects in a creature of statute law. *St. Louis, M. & S. E. Ry. Co. v. Busick* (Ark.), 1.

Cattle guards, under Kirby's Dig. § 6644, requiring their construction, the fact that a stock guard does not prevent stock from passing over it does not conclusively show that it is unsafe or defective. *St. Louis, M. & S. E. Ry. Co. v. Busick* (Ark.), 1.

Declaration was subject to special demurrer on the ground that it failed to specify wherein defendant was negligent, or to put it on notice of the tort complained of. *South Georgia Ry. Co. v. Ryals* (Ga.), 517.

Degree of care required of trainmen to avoid injuring stock. *Georgia Southern & F. Ry. Co. v. Jones* (Ga.), 154.

Evidence.

Evidence of the value of the stock injured is admissible to aid jury in determining amount of penalty to be imposed for violation of Kentucky statute requiring the construction of cattle guards. *St. Louis, M. & S. E. Ry. Co. v. Busick* (Ark.), 1.

Evidence of failure of trainmen to exercise due diligence sufficient to warrant refusal to reverse judgment overruling certiorari. *Atlantic & B. Ry. Co. v. J. B. Smith & Son* (Ga.), 489.

Lookouts, duty of engineers. *Cincinnati, N. O. & T. P. R. R. v. Burgess* (Ky.), 160.

Negligence of trainmen was question for jury. *Cincinnati, N. O. & T. P. R. R. v. Burgess* (Ky.), 160.

Ownership of stock, declaration was subject to special demurrer for failure to allege. *South Georgia Ry. Co. v. Ryals* (Ga.), 517.

Presumption of negligence from accident to stock on track. *Cincinnati, N. O. & T. P. R. R. v. Burgess* (Ky.), 160.

Presumption of negligence from fact that animal was killed by train. *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 497.

STOP, LOOK, AND LISTEN.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CROSSINGS; DEATH BY WRONGFUL ACT.

STOPPING TRAINS.

See CARRIERS OF PASSENGERS.

STREET RAILWAYS.

See CARRIERS OF PASSENGERS; CROSSINGS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; TRESPASSERS.

Application of ordinance imposing certain conditions as to rates of fare and giving transfers with respect to line owned by a street railway company, which extended from its point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which ran its cars with the same operatives into the city and to the point of intersection. *Virginia Passenger & Power Co. v. Commonwealth (Va.)*, 135.

Collision between electric car and bicycle, insufficiency of evidence of negligence. *McKee v. Harrisburg Traction Co. (Pa.)*, 3.

Contributory Negligence.

Care required of person driving on street car tracks. *Ablard v. Detroit United Ry. (Mich.)*, 722.

Driving team along track not negligence per se. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Lookout, care required of person driving team along track. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Not negligence per se for person to drive along street railway track in the nighttime, although street is of sufficient width to permit him to drive off the track, where cars cannot strike him. *Ablard v. Detroit United Ry. (Mich.)*, 722.

Of bicyclist, killed by street car was question for jury. *South Chicago City Ry. Co. v. Kinnare (Ill.)*, 229.

Of person driving on street car tracks, and injured in a collision with car, was for jury. *Ablard v. Detroit United Ry. (Mich.)*, 722.

Evidence.

Speed of street car, where it appeared that it was from 15 to 30 miles an hour, defendant was not prejudiced by the exclusion of evidence that the train with which it collided was running faster than ordinary speed. *Chicago City Ry. Co. v. Shaw (Ill.)*, 586.

Failure to sound gong or bell of a street car is not negligence as to one struck thereby, who knew of the car's approach. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

In case of collision between a street car and team, there is no presumption as to whether it was caused by the negligence of the driver of the one or the other. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Intersecting line, what constitutes so as to render applicable provisions of certain ordinance as to providing for issue of half-fare tickets and transfers. *Virginia Passenger & Power Co. v. Commonwealth (Va.)*, 135.

Knowledge of plaintiff's peril, instructions as to the duty of the motorman in stopping, or checking the speed of the car, and ringing the gong, were erroneous in making the fact of the proximity of the wagon to the railroad track, and not the knowledge of the fact by the motorman, the criterion of his negligence. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Motorman, in running car about twice as fast as he should have run it to enable him to control car to prevent an accident, and in relying solely upon his gong to warn travelers upon track, was negligent. *Ablard v. Detroit United Ry. (Mich.)*, 722.

Negligence in running street car against team, test of. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Negligence of motorman in running car against team, insufficiency of evidence of. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Reciprocal duty of using ordinary care to prevent collision in street of team and street car. *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 168.

Right of public to use tracks. *Ablard v. Detroit United Ry. (Mich.)*, 722.

STREET RAILWAYS—Continued.

Where ordinances granting a franchise to a street railway company imposed certain conditions as to rates of fare and giving transfers, and the company operated its lines in accordance with such regulations, it thereby assumed contractual obligations with respect to the regulations. *Virginia Passenger & Power Co. v. Commonwealth (Va.)*, 135.

STREETS AND HIGHWAYS.

See NUISANCES.

STRIKES.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

STRUCTURES NEAR TRACK.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

SUBSEQUENT SHIPMENT.

See CARRIERS OF LIVE STOCK.

SUBSTITUTES.

See TRESPASSERS.

SUDDEN PERIL.

See MASTER AND SERVANT.

SUFFERING.

See PERSONAL INJURIES.

SUFFICIENCY OF EVIDENCE.

See NUISANCES.

SUICIDE.

See ACCIDENTS ON TRACK.

SUPERINTENDENCE.

See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS.

SUPERIOR ORDER.

See MASTER AND SERVANT.

SURGICAL OPERATIONS.

See PERSONAL INJURIES.

SURVIVOR.

See DEATH BY WRONGFUL ACT.

SWITCHES.

See NUISANCES.

SWITCHING.

See MASTER AND SERVANT.

SWITCH YARDS.

See ACCIDENTS ON TRACK; LICENSEES; MASTER AND SERVANT.

TAXATION.

See LOGGING RAILROADS.

Cash value of railroad for purposes of taxation, how computed. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

City could not, under laws of Kentucky, impose occupation tax, as a revenue measure, for the transaction of business by a railroad, whose franchises had been valued and apportioned to the city, and the franchise tax, imposed by certain statute, paid by the company. *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 673.

Due process of law is denied a Kentucky corporation by a tax assessed under the authority of Ky. Stat. § 4020, upon its rolling stock permanently located in other states and employed there in the prosecution of its business. *Union Refrigerator Transit Co. v. Kentucky (U. S.)*, 690.

Evidence.

Classification of items of expense by railroad in its ledger or other accounts not evidence in its favor, except as they are substantiated by the original entries in company's books. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

Introduction of railroad account books was constructively waived by both parties. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

On issue of earning capacity of railroad, disputed items of debits bonds, and stock was admissible as tending to show cost of road. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

On issue of earning capacity of railroad, disputed items of debts and credits should be properly classified and submitted to the court for its determination; and opinion evidence of expert accountants as to such determination was inadmissible. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

On issue of earning capacity of railroad, it was error to permit expert accountants, who had examined the railroads' books, to give parol evidence of their opinion as to what the company's net earnings should have been, by such witnesses making an arbitrary classification and exclusion of debts and credits. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

On issue of value of railroad, certain offers to purchase it were inadmissible. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

Where witness had not made computations of railroad earning balances for a series of years, as to which he was asked to testify, and did not know whether such balances were correct, nor what items they included, he was not entitled to testify thereto. *State v. Nevada Cent. R. Co. (Nev.)*, 450.

Exemptions.

Purpose of framers of La. Const., as expressed in article 230, was to grant certain exemption to railroads, whether owned and operated by corporation, private society, or individual. *Amos Kent Lumber & Brick Co. v. Tax Assessor (La.)*, 446.

Franchise tax authorized by Ky. St. 1903, § 4077, is intended to cover all the intangible property of a public service corporation as represented by the earning value of its capital employed in the specific business in which it is engaged. *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 673.

Ky. Const. § 181, does not contemplate that the legislature may authorize a city to tax the same privilege twice for the same year as against the same owner. *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 673.

Local assessor may assess balance only, where portion of tract of land belonging to railroad and situated adjacent to its track is used for reservoir, and is therefore assessable by the state board of equalization, and the balance of it is not so used. *Chicago, etc., Co. v. People (Ill.)*, 826.

Mileage basis, when deductions should be made. *State v. Canadian Pac. R. Co. (Me.)*, 470.

TAXATION—Continued.

- Mileage basis, when length of steamboat line operated by railroad should be excluded from computation in determining franchise tax. *State v. Canadian Pac. R. Co. (Me.)*, 470.
- Net income of railroad for purposes of taxation, how computed. *State v. Nevada Cent. R. Co. (Nev.)*, 450.
- On issue as to value of railroad, taxes actually paid by the railroad should be added to its operating expenses and deduced from its gross income. *State v. Nevada Cent. R. Co. (Nev.)*, 450.
- Power conferred on municipal corporations, by Ky. St. 1903, § 3637, subsec. 4, to impose and collect license fees on all franchises, etc., is a revenue provision. *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 673.
- Presumption that items in railroads' books represented reasonable expenditures. *State v. Nevada Cent. R. Co. (Nev.)*, 450.
- "Railroad track," land used as reservoir from which company obtains water for locomotives is properly assessed as part of. *Chicago, etc., R. Co. v. Peoples (Ill.)*, 826.
- "Railroad," what included in term, as used in ch. 145, p. 160, Me. Pub. Laws 1901, providing for the taxation of railroads. *State v. Canadian Pac. R. Co. (Me.)*, 470.
- Spirit and intention of certain Maine statutes are to include only miles of single track of actual railroad lines. *State v. Canadian Pac. R. Co. (Me.)*, 470.
- Under Hurd's Rev. St. 1903, c. 34, § 27, the county board should, if practicable, act immediately after it has determined that the proposition for the levy of an additional tax has prevailed. *Chicago, etc., R. Co. v. People (Ill.)*, 826.
- Under Ill. Revenue Act, railroad may object to application for judgment of sale against lands taxed in its name, without averring or proving that it is interested in the land. *Chicago, etc., R. Co. v. People (Ill.)*, 826.
- Under Ky. Const., § 171, requiring taxes to be uniform ordinance imposing license fee upon business of selling railroad tickets by corporations that have been required to pay franchise tax covering same privilege is invalid. *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 673.

TELEGAPH STATIONS.

See MASTER AND SERVANT.

TEMPERATURE.

See EVIDENCE.

TEMPORARY DUTIES.

See TRESPASSERS.

TERMINAL CITY.

See EMINENT DOMAIN; RAILROADS.

TERMINALS.

See EMINENT DOMAIN.

TERMINATION OF LIABILITY.

See BAGGAGE; CONNECTING CARRIERS.

TERMINATION OF RELATION.

See CARRIERS OF PASSENGERS.

TERMINI.

See EMINENT DOMAIN; RAILROADS.

TEST OF NEGLIGENCE.

See STREET RAILWAYS.

TEXAS FEVER.

See CARRIERS OF LIVE STOCK.

THROUGH SHIPMENT.

See CONNECTING CARRIERS.

TICKET AGENTS' STATEMENTS.

See CARRIERS OF PASSENGERS.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS; STREET RAILWAYS; TAXATION.

Concealment by a railroad ticket agent of fact that railroad might not be able to return passenger within the time limited by the ticket sold him not such fraud as to vitiate contract, where it is not shown that, if passenger had known the fact so concealed, he would not have purchased his ticket. *Elliott v. Southern Pac. R. Co. (Cal.)*, 52.

Degree of care required of connecting carrier in performing contract to send instructions to initial carrier to deliver ticket to son, which had been paid for by his father, and its liability for delay on part of initial carrier in delivering ticket after receipt of instructions. *Brezewitz v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 347.

Delay caused by strike did not give holder of excursion ticket right to enforce passage under original contract, and on another journey taken by them within a reasonable time, subsequent to the time specified in such contract. *Elliott v. Southern Pac. Co. (Cal.)*, 52.

Ejection for failure to procure ticket, right to recover did not depend on conductor's knowledge or ignorance of fact that agent had no tickets for sale. *Ammons v. Southern Ry. Co. (N. Car.)*, 340.

Enforcement of rule requiring purchase of ticket before entering car. *Ammons v. Southern Ry. Co. (N. Car.)*, 340.

Expiration of ticket which contains no limitation as to time, either on its face or by reason of a regulation of the carrier. *Freeman v. Atchison T. & S. F. Ry. Co. (Kan.)*, 607.

Extension of time limit of excursion ticket because of strike and interruption of train service, reasonableness of. *Elliott v. Southern Pac. Co. (Cal.)*, 52.

Extra fare cannot be charged where failure to procure ticket, unless opportunity to procure one was afforded. *Rivers v. Kansas City M. & B. R. Co. (Miss.)*, 267.

Fact that purchaser of ticket did not sign contract will not relieve him from its obligations, nor is its binding force lessened by failure of passenger to observe reasonable condition plainly printed on face of ticket. *Freeman v. Atchison T. & S. F. Ry. Co. (Kan.)*, 607.

Fraudulent concealment by a railroad company of the fact that it might not be able to carry a traveler on his return trip within the time prescribed in a ticket which is sold to him does not give him the right to use the ticket at a time subsequent to that limited in the contract. *Elliott v. Southern Pac. Co. (Cal.)*, 52.

Larger fare may be charged because of non-compliance with rule requiring purchase of ticket. *Ammons v. Southern Ry. Co. (N. Car.)*, 340.

Right of railroad to limit time within which reduced rate ticket may be used. *Elliott v. Southern Pac. Co. (Cal.)*, 52.

Rule requiring purchase of ticket before entering car cannot be enforced unless opportunity to procure ticket has been afforded. *Ammons v. Southern Ry. Co. (N. Car.)*, 340.

Rule requiring purchase of ticket before entering car is reasonable. *Ammons v. Southern Ry. Co. (N. Car.)*, 340.

Time within which ticket could be used, condition on ticket con-

TICKETS AND FARES—Continued.

stituted part of contract, and was binding upon purchaser. *Freeman v. Atchison T. & S. F. Ry. Co. (Kan.)*, 607.

Waiver of time limit on ticket, statement by railroad employee, two days after sale of ticket, that it would be good as soon as train began to run, was not a waiver of the time limit on the ticket, where the employee making the statement was not the one who sold the ticket, and he was not shown to have any authority to make the waiver. *Elliott v. Southern Pac. Co. (Cal.)*, 52.

TICKS.

See CARRIERS OF LIVE STOCK.

"TICKY CATTLE."

See CARRIERS OF LIVE STOCK.

TIME LIMIT.

See TICKETS AND FARES.

TIME LOST.

See PERSONAL INJURIES.

TIME TO ALIGHT.

See CARRIERS OF PASSENGERS.

TITLE CONVEYED.

See RIGHT OF WAY.

TITLE PAPERS.

See RIGHT OF WAY.

TORPEDO EXPLODED CONTRARY TO RULES.

See PERSONAL INJURIES.

TORT OR CONTRACT.

See COMMON CARRIERS.

TORTS.

See NEGLIGENCE.

Burden of proving that servant's tort was committed within scope of his duties is on plaintiff. *Drolshagen v. Union Depot R. Co. (Mo.)*, 223.

"TRACK."

See TAXATION.

TRAFFIC AGREEMENTS.

See GARNISHMENT.

TRAFFIC ARRANGEMENT BETWEEN COMPANIES.

See FELLOW SERVANTS.

TRAIN DISPATCHES.

See FELLOW SERVANTS.

TRAINMEN.

See FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

TRAIN ORDERS.

See MASTER AND SERVANT.

TRAIN SEEN IN TIME.

See CROSSINGS.

TRAMWAYS.

See RIGHT OF WAY.

TRANSFERS.

See STREET RAILWAYS.

TRANSITORY ACTIONS.

See DEATH BY WRONGFUL ACT.

TRESPASSERS.

See CHILDREN; LICENSEES; RIGHT OF WAY; STATIONS AND DEPOTS.

Care due trespasser on track between park and depot. *Bartlett v. Wabash R. Co. (Ill.)*, 757.

Contributory Negligence.

Evidence that plaintiff's decedent was postmaster and should have known the schedule time of regular trains, but walked along the right of way ahead of one of such trains and suddenly stepped on track in front of it showed contributory negligence. *Louisville & N. R. Co. v. Redmon's Adm'x (Ky.)*, 737.

Crossing signals, failure to give was not negligence with respect to a trespasser killed by train on right of way. *Louisville & N. R. Co. v. Redmon's Adm'x (Ky.)*, 737.

Ejection.

Motorman was not within scope of his employment in ejecting a boy who was trying to ride on running board of street car. *Drolshagen v. Union Depot R. Co. (Mo.)*, 223.

Objection to petition that it did not state that act of motorman was within scope of his employment, not having been made except by an objection to evidence, petition would be held sufficient on appeal. *Drolshagen v. Union Depot R. Co. (Mo.)*, 223.

Ejection of trespasser, immaterial whether employee who committed the act was a fireman, or some other employee of defendant temporarily engaged as a fireman. *Chicago Great Western Ry. Co. v. Troup (Kan.)*, 6.

Evidence.

Refusal to allow defendants to ask witness how often he got messages that gentleman had drawn pistols on and threatened trainmen was proper. *Baltimore & O. R. Co. v. Deck (Md.)*, 640.

Testimony that after he was shot, and while he was lying on the ground, defendant's employee, in the presence of plaintiff and another, said, "Yes, if I hadn't shot — (him) I would have kicked his ribs in," is evidence against defendant that the employee shot plaintiff. *Baltimore & O. R. Co. v. Deck (Md.)*, 640.

In action for injury to boy, alleged to have been trespassing on street car, owing to repugnancy, it was proper to require plaintiff to elect on which count of declaration he would proceed. *Drolshagen v. Union Depot R. Co. (Mo.)*, 223.

Lookout duty not owed by trainmen to trespassers on right of way. *Louisville, etc., R. Co. v. Hathaway's Ex'x (Ky.)*, 749.

No error to refuse to limit inquiry as to the engine which injured plaintiff to an engine of a certain number. *Chicago Great Western Ry. Co. v. Troup (Kan.)*, 6.

No recovery for death of trespasser on railway right of way unless trainmen, after discovering his danger, could by the ex-

TRESPASSERS—Continued.

ercise of ordinary care have prevented the accident. *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 737.

Petition, by implication, alleged that fireman had authority to eject trespassers. *Chicago Great Western Ry. Co. v. Troup* (Kan.), 6.

Right of trainmen to assume that person walking beside track would keep out of danger. *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 737.

Speed of train in violation of ordinance was not negligence with respect to trespasser on track. *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 737.

Where railroad had not authorized the use of its track as a highway between park and depot a person so using the track was a trespasser. *Bartlett v. Wabash R. Co.* (Ill.), 757.

Whether one who was employed as a special officer by railroad company, and had a commission as police officer from state, was acting within scope of his employment with railroad when he shot person who was stealing a ride on company's freight train, was question for jury. *Baltimore & O. R. Co. v. Deck* (Md.), 640.

Who Are Trespassers.

Section foreman was not a trespasser in passing over side track on which he was struck on returning from answering call of nature. *Houston & T. C. R. Co. v. Turner* (Tex.), 630.

Wilful or wanton injury to trespasser on track, insufficiency of evidence. *Bartlett v. Wabash R. Co.* (Ill.), 757.

TRIAL.

Certain statements to the jury made by plaintiff's counsel, tending to create prejudice against defendant, were outside the record and improper, and it was error for the trial court to merely tell the counsel that they were improper, and not to admonish the jury to disregard them. *Louisville & N. R. Co. v. Smith* (Ky.), 148.

Reading in evidence of a rule of defendant railroad relative to the meeting of freight and passenger trains, which was inapplicable to the case, was prejudicial where plaintiff's attorney in his closing argument commented on the rule at length and on its alleged violation, and argued that such violation was negligence with respect to passenger struck by freight train. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

Remarks in the closing argument for plaintiff referring to poverty of plaintiff, wealth of defendant, and defendant's partiality to federal court, were improper. *Illinois Cent. R. Co. v. Proctor* (Ky.), 531.

Remarks of court in regard to medical works, harmless error. *Foss v. Portsmouth, D. & Y. Ry. Co.* (N. H.), 364.

TROLLEY POLES.

See CARRIERS OF PASSENGERS.

TROLLEY WIRES.

See MASTER AND SERVANT.

TROUSEAU.

See BAGGAGE.

TRUSTEES.

See ATTACHMENT; GARNISHMENT; LEASES AND RUNNING POWERS.

TRUSTS.

See MONOPOLIES.

UNCLAIMED FREIGHT.

See CARRIERS OF GOODS.

UNEXPECTED DANGER.

See MASTER AND SERVANT.

UNIFORMITY.

See TAXATION.

UNLAWFUL SPEED.

See CROSSINGS.

UNLOCKED BY STRANGER.

See STATIONS AND DEPOTS.

UNREMUNERATIVE RATES.

See COMMON CARRIERS.

USAGE.

See CUSTOM AND USAGE.

VALIDITY OF CONTRACTS.

See MASTER AND SERVANT.

VALUATION

See COMMON CARRIERS.

VALUATION OF FREIGHT.

See COMMON CARRIERS.

VALUE OF RAILROAD.

See TAXATION.

VARIANCE.

See EXPRESS COMPANIES; MASTER AND SERVANT.

VERIFICATION OF ANSWER.

See NUISANCES.

VICE PRINCIPALS.

See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS.

VICE PRINCIPAL'S NEGLIGENCE.

See FELLOW SERVANTS.

VIOLATION OF CONTRACT.

See MASTER AND SERVANT.

VIOLATION OF ORDINANCE.

See NEGLIGENCE.

VIOLATION OF RULE.

See FELLOW SERVANTS.

VIOLATION OF RULE IN PRESENCE OF FOREMAN.

See MASTER AND SERVANT.

VOLUNTARY ACTS.

See CONNECTING CARRIERS.

VOLUNTEERS.

See FELLOW SERVANTS.

WAITING FOR FREIGHT.

See COMMON CARRIERS.

WAITING ROOMS.

See STATIONS AND DEPOTS.

WAIVER.

See TAXATION.

WAIVER OF RELIEF DEPARTMENT BENEFITS.

See MASTER AND SERVANT.

WAIVER OF RULES.

See MASTER AND SERVANT.

WANTONNESS.

See CARRIERS OF PASSENGERS; NEGLIGENCE; TRESPASSERS.

WARNINGS.

See CARRIERS OF PASSENGERS.

WARNINGS AND INSTRUCTIONS.

See CARRIERS OF PASSENGERS.

WATERING STOCK.

See CARRIERS OF LIVE STOCK.

WATER STATIONS.

See TAXATION.

WATER TANKS.

See TAXATION.

"WAYS, WORKS, OR MACHINERY."

See EMPLOYERS' LIABILITY ACTS.

WEALTH OF DEFENDANT.

See TRIAL.

WEAR AND TEAR.

See MASTER AND SERVANT.

WEATHER CONDITIONS.

See EVIDENCE; FIRES SET BY LOCOMOTIVES.

WEDDING.

See BAGGAGE.

WEIGHTS.

See MASTER AND SERVANT.

WHO ARE COMMON CARRIERS.

See COMMON CARRIERS.

WHO ARE EMPLOYEES.

See MASTER AND SERVANT.

WHO ARE LICENSEES.

See LICENSEES.

WHO ARE PASSENGERS.

See CARRIERS OF PASSENGERS.

WHO ARE TRESPASSERS.

See MASTER AND SERVANT.

WIDOWS.

See DAMAGES.

WILLFULNESS.

See CARRIERS OF PASSENGERS; TRESPASSERS; WITNESSES.

WINDOW SCREENS.

See CARRIERS OF PASSENGERS.

WIRES.

See LICENSEES; MASTER AND SERVANT.

WITNESSES.

See PERSONAL INJURIES; TAXATION.

In action by passenger for damages from being directed to wrong car by flagman, fact that plaintiff was witness in another case involving misconduct on the part of the flagman was competent to show his bias as a witness. *Robertson v. Louisville & N. R. Co. (Ala.)*, 61.

In action for damages from being directed to wrong car by flagmen, fact that plaintiff was witness in another case involving misconduct on the part of the flagman was not competent as tending to show that he willfully directed her to wrong car. *Robertson v. Louisville & N. R. Co. (Ala.)*, 61.

WOMEN.

See PERSONAL INJURIES.

WORKING WITHOUT PAY.

See FELLOW SERVANTS.

WRONG CAR.

See CARRIERS OF PASSENGERS.

YARD FOREMAN.

See MASTER AND SERVANT.

YARDS.

See ACCIDENTS ON TRACK; CARRIERS OF LIVE STOCK; LICENSEES; MASTER AND SERVANT.

